

No. 16351 ✓

United States
Court of Appeals
For the Ninth Circuit

KIM BROS., a Partnership,

Appellant,

vs.

L. A. HAGLER,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 259 to 525)

Appeal from the United States District Court for the
Southern District of California
Northern Division.

FILED

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Southern District of California
Northern Division.

(Testimony of Lyle Adrian Hagler.)

Q. (By Mr. Shepard): This is in 1949, November 14th, and this is your signature?

A. Yes; that is mine.

Mr. Shepard: We will offer this.

The Court: It may be received.

The Clerk: This will be 10.

(The agreement referred to was marked as Plaintiff's Exhibit 10, and was received in evidence.)

Mr. Shepard: That is all the questions I have.

The Court: All right. Anything further from this witness?

Mr. Houk: We have one question.

The Court: Let's see if counsel is finished?

Mr. Shepard: I am finished, your Honor.

The Court: All right. [249]

Redirect Examination

By Mr. Houk:

Q. Mr. Hagler, just one or two more questions, I would like to ask you, that is, directing your attention to the testimony concerning this tree on the Hunter property, was there more than one tree on which there was any fruit involved or any sports involved? A. No; just one tree.

Q. Just one tree?

A. Only one I ever seen in there.

Q. As far as you were concerned there was never any other tree? A. No; never was.

Mr. Houk: That is all.

The Court: All right, step down.

The Witness: What about the records?

The Court: They are yours; they remain yours. They are still your records. You will need them for income taxes.

All right, gentlemen, we have reached a good stopping point. Just to give me an idea, because I have to plan week ends, because I have matters to do in Los Angeles, how much more time will you consume to conclude your side of the case?

Mr. Griswold: I think tomorrow will take care of the substantial portion of the evidence. It depends on the [250] cross-examination.

The Court: Both of you have been very moderate.

Mr. Griswold: There is one point where we might save some time. There are certain packing house records from the Tagus Ranch, and also from the Barr Packing Shed; we can subpoena the records although our expert has gone through the accounts in question and has taken the information necessary for his testimony.

The Court: Well, under the rules of the Ninth Circuit any person, when it comes to books of account, who has seen them can give summaries. That is the rule of the Ninth Circuit, and applies to bank books or anything of that character, and a person who has done that. The only materiality of the inquiry is as to ripening time. The other matters are matters which relate merely to an accounting, which, as I have told you, I am not going to take,

gentlemen. I am going to decide first if there is infringement. If I decide there is, then we will provide for the future accounting after the judgment becomes final, but at the present time I allowed counsel to go into the details a little more fully, though towards the end he omitted a lot of dates, which became absolutely immaterial.

Mr. Griswold: This will go to differentiation in varieties, your Honor, this testimony.

The Court: Well, if he is an expert, he can testify [251] as to his knowledge of ripening times of various fruits.

Mr. Griswold: I think that is sufficient, your Honor.

The Court: Then if he is asked to give the basis for his conclusion, he may state, but he doesn't have to produce the books. He may say he got it from an authority. In all expert testimony a man may refer to the things he has read and the things he has seen. I tried a malpractice case and two of the doctors testified to the fact that a certain type of fracture may occur in a seizure of an epileptic type; one man testified to his own knowledge, the other man testified that he had read it in the literature, and that is permissible on the part of an expert.

I can't rule in advance, I don't buy a pig in a poke, you know that expression, but so far as I know at the present time, I don't think we will have any problem.

Mr. Griswold: I believe by tomorrow the sub-

stantial portion of the defendant's case will be in, so that Friday, it would seem to me, we should finish.

The Court: Friday? I don't know what rebuttal counsel will have.

Mr. Shepard: I would go along with that estimate, your Honor. I think we can finish Friday.

The Court: Well, I like oral argument, gentlemen. I want you to argue right after, while the matter is fresh in my mind. The only reason I am asking is because if it [252] goes over to next week we will have a problem, because we have a holiday, you see; Tuesday is a holiday. We could hold court, if necessary, Monday, but Armistice Day is one of the few days we have. This is a government calendar, you see we only have Armistice Day and Thanksgiving Day. Election Day, yesterday, wasn't a holiday for us. So I am merely trying to find out because I have to plan to fly to Los Angeles over the week end and it all depends on when we finish what plane I can take. There is a plane at 5:55 which makes good connections, and if we finish Friday, if I finish in time to take that plane, I will be in good condition. However, if we don't, we will go to Monday, because I have cleared my calendar. I had a calendar in Los Angeles on Monday, but I cleared it because I anticipated this case would take longer, but with your co-operation we are going to reduce it from seven days to four days.

Mr. Shepard: My opinion would be we would

probably finish Friday, and I think by tomorrow night we can positively tell you whether you can get on that plane.

The Court: All right, gentlemen. We are doing very well.

(Thereupon, at 5:00 o'clock p.m. a recess was taken until 10:00 a.m., November 6, [253] 1958.)

November 6, 1958—10:00 A.M.

The Court: Cause on trial.

The Clerk: 1793, Kim Brothers, a partnership,
v. L. A. Hagler.

Mr. Griswold: Ready, your Honor.

The Court: Proceed, gentlemen.

Mr. Griswold: Mr. Byrnes.

The Court: Counsel have informed me that they want to show some slides, so we have them set up with a screen so they may be shown at the proper time. We will darken the room as much as we can. It is rather hard to make it entirely dark, but we will try by dimming all the lights. All right.

DAVID J. BYRNES, JR.

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: David J. Byrnes, Jr.

Direct Examination

By Mr. Griswold:

Q. Your name is David Byrnes? A. Yes.

(Testimony of David J. Byrnes, Jr.)

Q. You live in Visalia, California?

A. I do. [256]

Q. Your address?

A. 2649 West Iris.

Q. You are familiar with the Hunter orchard located in Visalia, Tulare County?

A. I am.

The Court: If you will lean back in your chair, Mr. Byrnes, your voice will carry more. That's it. Go ahead.

Q. (By Mr. Griswold): Am I correct, you had occasion to visit that orchard on September 11, 1958?

A. I did.

Q. And the purpose was to do what?

A. To photograph the tree in question.

Q. And that is the discovery Red King tree?

A. Yes.

Mr. Shepard: Object to the question, your Honor, and move the answer be stricken, on the ground of "the discovery tree." Obviously there is no foundation for this man to know whether or not he photographed the discovery tree except by hearsay.

The Court: Well, I think it should be pointed out this is tied to the statement he pointed it out to Mr. Byrnes.

Mr. Griswold: It is only for identification.

The Court: All right. The tree was pointed out to you as being the discovery tree by Mr. [257] Hagler?

(Testimony of David J. Byrnes, Jr.)

The Witness: Yes, sir.

Q. (By Mr. Griswold): Mr. Byrnes, I show you a photograph of a tree, and on the back showing the date September 11, 1958, Ward's Studio, and with some writing, "DJB present during photog." Is that your writing?

A. Yes; that is.

Q. I will ask you if you were present when this photograph was taken? A. I was.

Q. And is it a correct representation of what you saw there? A. Yes.

Q. And this tree was located in whose orchard?

A. Mr. Hunter's orchard.

Q. And that is located where?

A. I would say northeast of the Hagler orchards and holdings.

Q. And this tree had been pointed out to you prior to this date? A. Yes; it had.

Q. On more than one occasion?

A. No; only on one occasion.

Q. And do you know which tree in the Hunter LeGrand orchard this tree was? [258]

A. Yes.

Q. So you could identify it?

A. Yes; I could re-identify it immediately.

Q. And which tree is it?

A. This is the tree which had the Red Grand—the Red King sport on it, and which produced the Red King nectarine in question in this case.

Mr. Griswold: We will offer in evidence this photograph.

(Testimony of David J. Byrnes, Jr.)

The Court: It may be received.

Mr. Shepard: May I have voir dire on the photograph, your Honor.

The Court: I don't allow that to be done. If you want to, I will reserve ruling until you have cross-examined. I don't like to break the continuity of the examination.

Mr. Shepard: I would appreciate a reservation on the ruling, your Honor.

The Court: I will reserve the ruling until your cross-examination is completed.

Q. (By Mr. Griswold): Can you state which portion of the tree is shown in the photograph, Exhibit——

The Clerk: That will be B.

(The photograph referred to was marked as Defendant's Exhibit B, for identification.)

The Court: B for identification only. Just mark it on [259] the back, B for identification.

Q. (By Mr. Griswold): Do you have in mind the question, Mr. Byrnes?

A. No; will you repeat it?

Q. Which portion of the tree is depicted in this photograph?

A. This is viewing the tree from the east, and we are looking here at the trunk, and we can see it branching off to the left, this large forked branch or trunk, I don't know what you would call it, from which the Red King nectarines were produced.

(Testimony of David J. Byrnes, Jr.)

Mr. Griswold: No further questions.

The Court: All right. Cross-examine.

Cross-Examination

By Mr. Shepard:

Q. May I ask your occupation, Mr. Byrnes?

A. I am the accountant for Mr. Hagler, and I also have a poultry farm of my own.

Q. You saw this tree once?

A. I saw it twice.

Q. Twice?

A. Once prior to this bit of photography.

Q. When did you see it on the prior occasion?

A. With Mr. Braun.

Q. And about what time was that? [260]

A. May I correct myself?

Q. Yes.

A. I believe I have seen it three times, now that I think about it.

Q. Will you tell us——

The Court: Just a minute. Go ahead, give the dates.

The Witness: I visited with Mr. Clinton Hagler when we collected some samples of the branches, the leaves, and that was the time I think I had in mind.

Q. (By Mr. Shepard): And approximately when was that?

A. I would say in the latter part of August, or early September.

(Testimony of David J. Byrnes, Jr.)

Q. Of this year? A. Yes.

Q. And then did you visit it on another occasion?

A. Yes; on September 11th, with the photographer who took this picture.

Q. Now, then, Clinton Hagler pointed it out to you? A. Yes.

Q. And then you visited it subsequently with the photographer?

A. Yes. I am trying to remember whether or not I did visit it with—yes, that's right, with the photographer. I misunderstood you there. [261]

Q. And do you know the difference between Red Kings and LeGrands?

A. I believe I would. I believe I do.

Q. Did you see any Red Kings on the tree, so-called Red Kings at the time you visited the place?

A. No.

Q. Did you see any LeGrands on either occasion? A. No.

Q. Would you be able to identify the varieties on that tree without the fruit on the tree?

A. Without the fruit?

Q. Yes. A. I doubt it.

Q. And so you didn't see the tree with fruit on it? A. No.

Q. So you would not testify here in court that you have personal knowledge of your own observation as to what varieties are on that tree?

A. No. My purpose here is to identify the photo-

(Testimony of David J. Byrnes, Jr.)

graph only, that it was of this particularly named tree.

Q. Yes. But you mentioned that the photograph contained the Red King branch?

A. Yes; simply by identification as conveyed to me by others.

Q. And that testimony was hearsay, somebody else told [262] you that? A. Yes; it was.

Q. And where is the tree located of which the picture was taken?

A. I would say on the east side of the Hunter orchard, the second one down from the north, and there is kind of a sand pit which breaks into the orchard there.

Q. Now, do you keep Mr. Hagler's records?

A. I do.

Q. And were you the one who made up these records as to the time of picking and packing of the various varieties?

A. I don't know which ones you refer to, but I did make up some, yes.

Q. There were some Mr. Hagler produced in court here, on long yellow sheets?

A. Yes; those I made up, some on long yellow sheets.

Q. Were you aware of the fact that in 1958 his Early LeGrands and his Regular LeGrands were run together on one sheet? A. In 1958?

Q. Yes. A. Yes; I guess they were.

The Court: Aren't you in error?

(Testimony of David J. Byrnes, Jr.)

Mr. Shepard: Pardon me?

The Court: Aren't you in error? '57 were [263] mixed up.

Mr. Shepard: I believe——

The Court: They were run on the same sheet but they clearly indicated what they were. They were not mixed up. The year before he said they were mixed up, the boxes were mixed up.

Mr. Shepard: Your Honor, is that sheet in question still in court here?

Mr. Griswold: I don't know whether it is or not.

Mr. Houk: I have it here, but I can't see what——

The Court: No, no; let's show counsel. They were run on the same sheet but it distinctly designated, as I remember, so he was able to give you dates when he started the early and the late—and the regular.

Mr. Shepard: I just want to know if this accountant—will you pick out that sheet?

A. Yes. I want to set that one out. I guess this top one is the sheet you are referring to for the year '58.

Q. Yes.

A. And on that sheet there is a line of demarcation after July 4th, indicating that the Early LeGrands were packed up to that date in the amount of 5,855. I might say, quite frequently during that period they were bringing in a small quantity of Regular LeGrands, and after that period they were

(Testimony of David J. Byrnes, Jr.)

bringing in small quantities of Early LeGrands, simply because certain orchards in certain areas will ripen [264] early or late. For that reason it is very difficult for us to sharply define just which were early and which were late during this period.

The Court: That demarcation would indicate that during the preceding period you had picked chiefly the early LeGrand, although there may be some runover?

The Witness: Yes, sir.

Q. (By Mr. Shepard): However, the prior year, 1957, you made two separate sheets, one for early and one for regular LeGrands?

A. Yes, sir. The reason was the crop was so much larger during '57 than it was during '58, that we were far more interested in seeing just exactly what we received from the orchard, and apparently the ripening period was shorter and it was easier to separate the two.

Q. Those are copies, aren't they?

A. Yes; they are.

Q. You have your originals at home?

A. We do.

Q. It won't embarrass you to have those left in court here?

A. No; that is why we tried to make the copy and these are carefully and faithfully done, as well as we could possibly do.

Q. I appreciate that. [265]

A. Yellow can't be photostated, at least it can't in the Visalia machines we have down there.

(Testimony of David J. Byrnes, Jr.)

Q. That is all right, Mr. Byrnes. These sheets that I have grouped together, just look at them briefly, will you, Mr. Byrnes, sir? Those are the 1956, '57 and '58 records of the Early LeGrands, LeGrands, and the Red Kings? A. Yes.

Q. Is that correct? A. Yes.

Mr. Shepard: I would like to introduce those in evidence, your Honor, as Plaintiff's Exhibit seriatim, next in order. I think it would save a lot of dispute and argument later on about these dates.

The Court: If there are duplicates, have you any objection, gentlemen? I thought they were original books of entry.

Mr. Griswold: No, your Honor, no objection.

Mr. Shepard: He says these are copies.

The Court: All right. The witness was going to say something. What is it, Mr. Byrnes?

The Witness: There is in addition the record of 1955 here, which you did not mention.

The Court: There was no examination; you better withdraw that. We didn't talk about '55 at all?

Mr. Shepard: No, sir. [266]

The Witness: That was named in the subpoena, that is why we brought that.

The Court: Which is '55?

The Witness: This is.

The Court: What are these?

The Witness: This is '56.

The Court: Well, they are in reverse order. All right, they may be received as one exhibit.

Mr. Shepard: How many sheets?

(Testimony of David J. Byrnes, Jr.)

The Court: Well, I will count them, seven. All right, Mr. Glover. I want to say, gentlemen, I don't know if some of you know Mr. Glover, who is the deputy clerk here.

Mr. Shepard: Very good man, your Honor.

The Court: Ordinarily we don't substitute clerks in the middle, but Mr. Eiland had to attend to some personal matters. We have to train him anyway, and he might as well start in the middle of a case and learn how to carry on.

The Clerk: This is Plaintiff's Exhibit 11.

(The sheets referred to were marked as Plaintiff's Exhibit No. 11, and were received in evidence.)

Mr. Shepard: That is all the questions I have, your Honor.

The Court: All right, any redirect?

Mr. Griswold: No questions.

The Court: All right, step down, Mr. [267] Byrnes.

I think Mr. Byrnes may be excused. They are all your witnesses and some were connected with you, so I have not made any ruling as to them, but unless you want them to stay around they might as well go about their businesses.

Mr. Griswold: We may want him to run one of the slide machines.

The Court: It is up to him then. All right. You keep him if you want. All right.

Mr. Griswold: Mr. Braun.

(Testimony of David J. Byrnes, Jr.)

The Court: To complete the record, do you want further identification? Do you want Mr. Hagler called back and testify—I think he testified yesterday he showed this to the photographer? Do you want further identification?

Mr. Shepard: What is that, your Honor?

The Court: The photograph, B, should be offered now?

Mr. Shepard: The record is that Mr. Clinton Hagler showed this to the witness.

The Court: Aren't you being very technical. You want Clinton Hagler brought here just for that purpose?

Mr. Shepard: I don't know if Mr. Hagler testified that a photograph——

The Court: Let me do it for you. As long as you are going to be technical, I will show you I can fix any technicality. Come over, Mr. Hagler. I believe in an attorney protecting his client, but I don't believe it helps [268] the administration of justice when men testify to certain things to stop merely because of a little thing. Mr. Hagler, showing you this picture—it down here. Let me see that. Give it to me.

LYLE A. HAGLER

the defendant, having been previously duly sworn, testified further as follows:

The Court: I show you a photograph which has been taken by Mr. Byrnes.

The Witness: That is it.

(Testimony of Lyle A. Hagler.)

The Court: What is this?

The Witness: This is the picture of this Red King forked tree.

The Court: Is it a correct representation?

The Witness: Yes; it is.

The Court: This was taken on what date, Mr. Byrnes?

Mr. David Byrnes: September 11th.

The Court: And that has been there since when, that tree?

The Witness: Well, since I discovered it; it has been there since 1950.

The Court: And still is?

The Witness: Still is.

The Court: All right. Any questions?

Mr. Shepard: No questions. [269]

The Court: All right. Do you offer this?

Mr. Griswold: I offer that in evidence.

The Court: It may be received.

(The photograph heretofore marked as Defendant's Exhibit B for identification, was received in evidence.)

Mr. Griswold: Mr. Braun, have you been sworn?

OSCAR MARTIN BRAUN,

a witness for the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Oscar Martin Braun.

(Testimony of Oscar Martin Braun.)

Direct Examination

By Mr. Griswold:

Q. For the record, state your full name.

A. Oscar Martin Braun.

Q. Your address?

A. 11150 East California Street, or Avenue, Sanger.

Q. And your present occupation?

A. Instructor, Fresno State College.

Q. And how long have you been an instructor at Fresno State College? A. Since 1936.

Q. And in which department are you?

A. In the horticulture department.

Q. And that includes fruits? [270] A. Yes.

Q. Other than grammar and high school, what higher education did you receive?

A. I graduated from the University of California, with the B.S. degree in agriculture, and took further work for a Master's degree in vocational education.

Q. Was that the State University at Berkeley or Davis, California?

A. Both, at Berkeley and Davis.

Q. And then did you teach agriculture in the public schools of California?

A. Yes, sir. I started at Petaluma in the fall of 1929, and then went to Fowler in 1930, and remained there until 1936, when I began to teach at Fresno State College.

(Testimony of Oscar Martin Braun.)

Q. What other work experience have you had in the field of horticulture?

A. Well, I have—during the summer times while I was teaching I inspected fruit in the Department of the Agricultural Commissioner of Fresno County, and during the war period I was instrumental in a labor training program for people in pruning trees and vines, and I also was on a farm and have done farming work.

Q. Now, have you ever done any work as far as plant breeding? A. Yes, I have. [271]

Q. Will you state it? A. Sir?

Q. Will you state what that experience has been?

A. My first job upon graduating from the University of California was to take a position with the Peter Wheeler Seed Company, at Gilroy, as field foreman and I also was in charge of their plant breeding and selection work.

Q. And have you done any work in plant breeding problems here in Fresno, California?

A. Yes, I have, for a number of years I have done hybridizing and selection on my own ranch, and I also have supervised students in special problems in plant breeding work in connection with Dr. Weinberger and Mr. Thompson who are with the U. S. Department of Agriculture here in Fresno

Q. That is Dr. John Weinberger?

A. Dr. John Weinberger, yes.

Q. And then you have a diversified fruit farm of your own located where in Fresno County?

A. Sanger, California.

(Testimony of Oscar Martin Braun.)

Q. And that is how many acres?

A. Sixty.

Q. And what do you grow on that farm?

A. Peaches and plums and grapes and citrus.

Q. You have been asked to perform a study on nectarines? [272] A. Yes.

Q. You are familiar with the Hunter ranch in Visalia, Tulare County? A. Yes, sir.

Q. Am I not correct that you did some work for Mr. Hagler several years ago, relative to an application for a patent? A. Yes, sir.

Q. I show you Defendant's Exhibit A, and ask you if you are familiar with that patent and its contents? A. Yes, I am.

Q. And did you, at the request of Mr. Hagler or his representative, prepare any information for him? A. Yes, I did.

Q. And will you state briefly approximately the time that you were engaged in that work, the year and the month, if you can, and generally what you did in that connection?

A. As I remember, I believe that Mr. Riesner came to me, Mr. Robert Riesner I guess it is, came to me sometime during the summer of, I believe it was in June or July, of 1956, as I remember it, and asked me if I would write up the descriptive notes for this mutation which they had found of the Red King on the Hunter ranch.

Q. And did you so prepare information for Mr. Riesner and Mr. Hagler? [273]

A. Part of my work at Fresno State College is

(Testimony of Oscar Martin Braun.)

to teach a class in systematic pomology, and I have always been interested in studies of fruit varieties, and I studied fruit varieties for many years and have judged fruit in many of the San Joaquin Valley fairs, and so I said I would be glad to write up a description of the fruit for him, yes.

Q. And that formed the basis of the claims and specifications in Exhibit A of the defendants, which I have shown you? Did you——

The Court: He didn't answer.

The Witness: Yes, sir.

The Court: I didn't hear.

Q. (By Mr. Griswold): In order to do this work, what did you do, in order to perform this service? What did you do?

A. Well, I believe that previous to that time, I think it was in 1955, that Mr. Riesner had taken me over and showed me this tree, and remarked that it was a mutation from the regular LeGrand, and I have seen the fruit——

Mr. Shepard: Your Honor, I think it would be objectionable and I do object to his——

The Court: Well, what he stated to you is immaterial. What he showed you is material. The statement that Mr. Riesner made may be stricken. Have you testified in court before? [274]

The Witness: No, sir.

The Court: When you testify you must bear in mind that you cannot give statements made to you unless, for instance, Mr. Kim talked to you about

(Testimony of Oscar Martin Braun.)

the matter, that would be admissible, because he is your opponent, but you can't make statements as to what Mr. Hagler testified, or anyone else who represented him. You can state what they showed you, and then what you did following that. Go ahead.

Q. (By Mr. Griswold): So a tree was pointed out to you? A. Yes, sir.

Q. I show you Defendant's Exhibit B and ask you if you can identify the tree in that photograph, or the trunk thereof? A. Yes.

Q. And what is it?

A. This is the trunk of the tree which has the Red King mutation on it.

Q. And that is the tree that Mr. Riesner pointed out to you, you believe in 1955? A. Yes.

Q. Have you had occasion to inspect and look at the fruit on that tree? A. Yes, sir.

Q. At a later date, you were asked to do a study as far as [275] the fruits of the tree which you have identified as the variety known as Sun Grand, or plant patent 974? A. Yes, sir.

Q. Prior to that request you were familiar with the Sun Grand nectarines? A. Yes, sir.

Q. And the fact it was plant patent 974?

A. Yes, sir. I believe that in the publication put out by Mr. Brooks the name was formerly Sun Brite, in the first report of variety it was not Sun Grand but it was later changed to Sun Grand.

Mr. Savage: I didn't understand that.

(Testimony of Oscar Martin Braun.)

The Witness: I believe the name of the Sun Grand was originally Sun Brite.

Mr. Savage: How do you spell it?

The Witness: B-r-i-t-e. In reading the report produced by Dr. Brooks, in the register of new fruit varieties, I believe that is the way I saw it.

Q. (By Mr. Griswold): Well, you were familiar with the variety? A. Yes, sir.

Q. Now, it is true that I asked you to do a study, did I not?

A. Yes, and I said that I would look at the fruit and tell you what I found. [276]

Q. And when did you commence that employment, approximately?

A. I believe it was March 1st.

Q. Of which year? A. 1958, of this year.

Q. Now, will you state in a general way the time that your study has covered, and what you did pursuant to my request?

A. Well, you asked me to locate some Sun Grand orchards where I could make a study as the season progressed of the Sun Grand variety, and compare it to Red King, so I called up the Barr Packing Company and asked them if they had any growers in their area who had Sun Grand nectarines, and they said they had a grower, Mr. George Kozuki, who lives on East Adams Avenue in the Parlier district, and who has a Sun Grand planting on a ranch located on East Lincoln Avenue. So I arranged to meet Mr. Kozuki and got his permission—I told him I was interested in making a study

(Testimony of Oscar Martin Braun.)

of the characteristics of the Sun Grand, and he went out with me and I picked a tree at random and tagged that tree, and used that tree the entire season in making selections of material from the tree for study. Then I also called the Valley Packing Company—I mean I called the Bonn Packing Company at Sanger and asked their office manager if they knew of anyone who had Sun Grand nectarines, and they said Mr. Harry [277] Hiraoka at Fowler had a planting of Sun Grand nectarines, and I got in touch with Mr. Hiraoka and got his permission also to make a study of this variety. I tagged the tree and located it, and used that same tree throughout the entire study. Then I proceeded—that was, I believe the first visit there was March 1st, I believe, it was a Saturday, I think. Teaching I had to arrange to do all my work on weekends, or before and after hours, so it would not conflict with my classes, so most of my selections were made on Saturdays and Sundays, and my study was done mostly off time, too.

Q. Now, did you pick out any other trees to use in this test?

A. Well, those were the two trees that I picked out. And then on April 5th you sent me a memorandum which gives permission, or you asked permission from the Kim Nursery Company to furnish us with some orchards or some locations where we might find some Sun Grand nectarines, and I chose the Tagus ranch because it was much closer to the

(Testimony of Oscar Martin Braun.)

Hagler planting, and I think that is important, because you have a closer situation, which is more likely to give a truer picture of how the fruit variety ripens and is growing more under the same conditions, so that everything is more normal.

Q. In other words, Mr. Shepard will verify, Tagus [278] ranch was given by the plaintiff, Kim, as one of the ranches on which there were Sun Grand?

Mr. Shepard: I would be very willing to introduce my letter to you in evidence.

The Court: Well, it doesn't matter, as long as you agree, there is no use encumbering the record with letters. All we are interested in is the reason why that was chosen.

Mr. Shepard: I will stipulate that on March 14, 1958, I advised Mr. Griswold by letter that among other ranches the Tagus ranch, on Highway 99 north of Tulare, California, had Sun Grands growing thereon.

The Court: All right.

The Witness: I located Mr. Keegan, the manager, he went out with us and we located—I believe Mr. Lyle Hagler was with me at the time, and we located a tree and there again I marked the tree and took down the exact location.

Q. (By Mr. Griswold): How far is the Tagus ranch from the Hagler farm?

A. Well, sir, I didn't actually measure that, I would say probably, oh, two or three miles. Of course, we also selected a tree in the Lyle Hagler

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plantings for study and marked the tree, and went to that tree.

The Court: Well, the distance is not such that there would be variety of climatic and soil variations and the like?

The Witness: No, sir, the conditions are very similar, [279] soil conditions and climatic condition I would say are approximately the same.

The Court: Giving due allowance to the fact that there may be variations within the same district and county, the variations are not likely to be encountered in so short a distance, isn't that true?

The Witness: That is correct. There are always some variations in soil conditions. However, I think these were what you would call normal conditions.

The Court: I see. All right.

Q. (By Mr. Griswold): Did you study any other orchard or tree, or trees, in addition to the ones you have mentioned?

A. Well, I also studied, of course, the mutation tree of the Red King on the Hunter ranch.

Q. State generally what you did in relation to each one of these trees?

A. Well, what I would——

Q. I want your procedure.

A. My procedure is this, since you asked me to get the information and make a comparison to see what differences there were between these varieties, it was necessary for me to immediately, upon

(Testimony of Oscar Martin Braun.)

the very first visit, on March 1st, when I located these orchards, to take samples of blossoms, as the trees were in blossom. Now, it wasn't until April 5th that [280] I visited the Tagus ranch and the Lyle Hagler place, so I didn't get any blossoms, of course, from those trees, but for the two ranches I visited, George Kozuki's ranch and Harry Hiraoka's ranch, I started immediately to take material and have pictures taken of that, and I studied it and looked for these differences.

Q. So you started out in the blossom period?

A. Yes, sir.

Q. And made photographs of the blossoms?

A. Yes, in the—my guide in all this work, in all my systematic work in classifying peaches and nectarines trees is the standard that is published by Blake & Edgerton, which I call my bible from the standpoint of analyzing and comparing trees, and they list some 28 different characteristics in this publication which are all important, no one characteristic is entirely important; they are all important. There is controversy on some of these, of course, so I tried to get every possible characteristic I could and use it in the study.

Mr. Shepard: Are you going to introduce that? I want to write it down.

Q. (By Mr. Griswold): You referred to this publication by Blake & Edgerton, Standards for Classifying Peach Characters?

A. By the New Jersey Agricultural Experiment Station, [281] Bulletin 728.

(Testimony of Oscar Martin Braun.)

Mr. Griswold: We will offer this in evidence, if the Court please.

The Court: It may be——

Mr. Shepard: Your Honor, I don't think the books are allowable in evidence. I would like it for identification.

Mr. Griswold: All right, that is all right.

The Court: I don't know any rule that doesn't allow them.

Mr. Shepard: As I understand it, an expert witness may refer to the book but he may not read from the same.

The Court: Oh, that is where you are absolutely wrong. He may read the same and photograph the same. As a matter of fact, in the last opinion I wrote involving a patent, whole pages of encyclopedia relating to plastics were introduced in evidence. You must bear in mind, we are not governed by the State rules of evidence. We are governed by rules which we make ourselves.

Mr. Shepard: Well, your Honor——

The Court: Just a minute. Just a minute. When counsel tells me something isn't the law I want to be sure that he knows what he is talking about, and that I know what I am talking about. Get me the opinion, so I can show you what we have, so we will not have merely a repetition. Just a minute. Let's get the latest patent case, so we will know what we are doing. Get me 161 F. Supp. 437, Van Brodie [282] against Cox Air. However, in

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order not to encumber the record, it would be better if counsel were to refer to any special fact. This is a pamphlet that is probably difficult to get, it is dated in 1946.

The Witness: Your Honor, I wish to quote from that pamphlet which contradicts some of the statements made by former witnesses.

The Court: I think the best way, this should be marked for identification, and then the portions that you quote, refer to, will go in as a part of your testimony, so we will mark it for identification. But I want to settle the problem. The Van Brode Milling Company, incidentally, was decided in April of this year, April 21, 1958, in which I declared a patent invalid; I think the second one in my entire career where I have done that, because ordinarily, if there is any way of saving a patent I will construe it narrowly in order to save it, but this one I killed entirely. In that particular case, in footnote 18, reference was made to a catalog of Dow Chemical Company, as the witness had identified it, showing that this particular combination for plastic was recognized in the trade. In footnote 21, a page from the Styrene Polymers and Copolymers, Modern Plastics Encyclopedia and Engineers Handbook of 1950, page 754 was introduced. In footnote 22 page 157 of the Modern Plastics Encyclopedia was introduced. Those are just [283] illustrations.

Mr. Shepard: Your Honor, wasn't that to show the prior state of the art?

The Court: Which?

(Testimony of Oscar Martin Braun.)

Mr. Shepard: To show the prior state of the art, to show the patent was not really a new venture, was that the purpose?

The Court: Well, that was one of the purposes, but a witness who testified as to his qualifications may refer to publications which either support his statement or contradict others.

Mr. Shepard: I agree with your Honor on that. I just thought that on direct examination to support his opinion and conclusions it was generally the preferred rule he should not read from the textbooks.

The Court: No, no. If he wants to say that this has the support of someone else, if he testifies as an expert, it merely adds to the source of his information, just as I referred to in another opinion, that hasn't been published yet, an opinion I have written since. I stated the other day, a question arose whether a fracture of the hips could follow an epileptic seizure, whether induced by epilepsy or what we call electro-shock treatment, and two of the doctors referred to a page of a book, I forget the name of the book, it was a very odd name, in which such a case is noted, and they did it as a part of their statement. [284]

Mr. Shepard: I appreciate your information and advice.

The Court: It isn't information and advice. I have been a judge too long to just say "this is my ruling." Perhaps I go back to the fact that I

(Testimony of Oscar Martin Braun.)

taught law for ten years in addition to other activities, and therefore I taught my students to try to give reasons and I try to give my reasons to counsel, so they will know I am not just arbitrarily ruling.

Mr. Shepard: I appreciate that, and I hope your Honor doesn't think I am being obstreperous in making an objection.

The Court: No, no, you are trying to protect your record, which is all right. All right.

Q. (By Mr. Griswold): So you used the publication which is being marked for identification to guide your study and research?

A. Yes, because I feel this is one of the most complete procedures that I have encountered by many years of study in horticulture and systematic pomology.

(The pamphlet referred to was marked as Defendant's Exhibit C, for identification.)

Q. Now, will you proceed and relate—you started out by taking photographs of the blossoms.

A. And I proceeded each week, whenever I found it was necessary to visit these special trees which I had marked out at random, take samples of the fruit as it was growing, [285] or the leaves or twigs, as the season progressed, and I took—had pictures taken, in some cases I took some myself, and then also we had fruit put aside for storage purposes.

The Court: I think the book should be given an identification.

(Testimony of Oscar Martin Braun.)

The Witness: I would like to quote from that during——

The Court: Just call it C for identification. All right.

Q. (By Mr. Griswold): I would also like to add another bulletin to be marked for identification, The Taxonomic Value and Structure of the Peach Leaf Glands.

The Witness: Yes, sir, I wish to use this also because this also contradicts some statements made by another witness.

The Court: And who is the author of that?

The Witness: Gregory, Dr. Gregory.

The Court: Cornell University?

The Witness: Yes, sir.

The Court: All right, this may be——

The Witness: I think that is a very important publication.

The Court: It may be marked for identification, to be referred to by the witness. All right. That will be D for identification.

(The pamphlet referred to was marked as Defendant's Exhibit D, for identifica- [286] tion.)

The Witness: Your Honor, I would like to have permission to use that also during the presentation.

The Court: That is all right; permission will be granted, and then if you do more than just quote and it is necessary I will have those photostated so these may be returned. I have learned from ex-

(Testimony of Oscar Martin Braun.)

perience in the trial of these lawsuits that many of these exhibits are very, very valuable. I know in one involving the trade name of a dramamine we used very valuable dictionaries and the like, and we received them in evidence and photostated the pages because they were valuable. And I remember one patent case I tried involving a tool to discover deflection in a slant drilling where they brought in an exhibit that was worth \$16,000, an exemplar of the tool, which of course was later photographed and the original withdrawn.

All right. This is a good stopping point so as not to break the continuity of this witness' testimony. We will take a short recess, unless you have other documents you want him to identify.

Mr. Griswold: No, I think it is a good breaking point.

The Court: All right.

(A short recess was taken.)

Mr. Savage: If the Court please, yesterday the defendant requested that we get the information from Mr. Stafford as to whether or not we had sold Sun Grands to the two Japanese [287] who have been mentioned just recently. We have that information and we are willing to stipulate that we did sell Sun Grand nectarines to these two Japanese, whether they planted them or not, or what they did with them we don't know.

Mr. Griswold: For the record, their names again?

(Testimony of Oscar Martin Braun.)

Mr. Stafford: Mr. George Kozuki, and Mr. Harry Hiraoka.

The Court: All right.

Mr. Stafford: George Kozuki, 16163 East Adams, Parlier, California, and Harry Hiraoka, 6232 South Leonard, Fowler. We sold them both.

Mr. Savage: Is that satisfactory?

Mr. Griswold: Yes, we will so stipulate.

Q. (By Mr. Griswold): Those are the individuals whose trees you visited and marked the trees as you have described? A. Yes, sir.

Q. Mr. Braun, I am going to ask you to demonstrate your findings. Would it be better to go through the pictorial evidence that you have, your slides, and explain your findings from those slides?

A. Well, I feel that I would rather do it that way. There are many characteristics, and of course you know in the development of fruit you have a normal curve, a normal distribution of variances as to all characteristics, and there are some characteristics that are similar in Sun Grands and in Red Kings. And so I would prefer to show you [288] what I found on the screen here, if I may discuss it as I project it.

The Court: Well, we will have to have it set up so the reporter can work.

The Reporter: There is enough light for me to see.

The Court: All right. Go ahead then.

Mr. Shepard: Your Honor, I don't want to

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appear obstreperous, but I want the record to show that I have never seen these photographs before, and I know it would be cumbersome at this stage of the game to show them to me beforehand, so I guess I will just have to go along with it.

The Court: Well, it is not necessary to exhibit to the other side in advance expert's photographs or things that an expert may bring along with him.

Mr. Shepard: I am just making that observation.

The Court: That is all right.

The Witness: May I proceed?

The Court: Yes. First, you better identify each slide so it can be tagged and given a number, or a **designation in the record.**

The Witness: Yes, sir.

The Court: As you do, you better describe the——

The Witness: The first slide, your Honor——

The Court: ——instrument that you are using.

The Witness: I am using a projector, 35 [289] millimeter projector, and we are projecting 35 millimeter slides.

In the first slide it shows comparative pictures of some flower buds taken from these trees and these are the calyx cups.

Mr. Shepard: As the Court pointed out, does Mr. Baun have some sort of a number on each of these slides?

The Witness: I will have to number them as we go along.

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Mr. Shepard: Would you put a number of them?

The Court: If you put one, we will have to give it a different number in the record as you go along, and these——

The Witness: In this particular slide——

The Court: These will have to be left here.

The Witness: ——it shows——

The Court: Just a minute. The clerk will have to identify these. These will have to be left here. These are——

The Witness: Yes, sir.

The Court: ——part of the exhibit.

The Witness: Yes, sir.

The Clerk: This will be Defendant's E.

Mr. Savage: May I suggest we give it a certain exhibit number, and then 1, 2, 3, 4; it will be less confusing. There will be dozens of them.

The Clerk: The next number, your Honor, will be Defendant's E.

The Court: Then E-1, E-2, E-3 and so forth.

Mr. Savage: That is what I was suggesting. Thank you, [290] your Honor.

The Court: All right.

(The slides hereafter shown were marked for identification after each was shown, as Defendant's Exhibits E-1 to E-69, both inclusive.)

The Witness: This is a slightly different picture I wish to show you, there is a slight difference in the calyx cup here, and in the size and width of

(Testimony of Oscar Martin Braun.)

the calyx cup, which Blake and Edgerton mentioned as characteristics which are important to consider. Now, also I wish to point out to you these are the calyx cups. The calyx lobes here are also different in the Red King, the original tree, the Hunter tree and the Red King graft.

Q. (By Mr. Griswold): Mr. Braun, will you identify the source of each blossom, in each case, as you go through these slides? First identify it.

A. This blossom is from the original Hunter mutation tree, the Red King. This blossom is from the Red King graft from the Hagler ranch. This blossom is from the Sun Grand at the Hiraoka ranch, and this blossom is from the Sun Grand at the Kozuki ranch.

Now, Blake and Edgerton mention in their reference that the length of the calyx lobes are also useful to distinguish one variety from another, and I wish to point [291] out that there is some difference in the sizes that make up these lobes. Film No. 2.

Q. First, let's take that and mark it and give it to the Clerk.

A. Yes, sir.

The Court: All right, Exhibit E-1.

The Witness: Slide No. 2, I wish to show you a longitudinal section of these same buds, and, by the way, all these samples that I took, I took random samples. I did not pick any samples, because that would invalidate the samples. Here again may I point out, first identify again, this blossom is from

(Testimony of Oscar Martin Braun.)

the Red King, the original tree; this is from the Red King from the Hagler graft; this is from Sun Grand at Hiraoka; this is from Sun Grand at Kozuki.

The Court: They are in the same order on all these slides?

The Witness: They are in these particular ones.

The Court: All right.

Q. (By Mr. Griswold): For the record, "O" means the original tree?

A. Yes. "Gr" is graft from Hagler ranch; "H" refers to the Hiraoka ranch, and "K" refers to the Kozuki ranch.

Q. And you have so designated throughout?

A. Yes, sir. "T" will refer to the Tagus ranch.

The Court: All right. [292]

The Witness: Now, may I call your attention to a variation in the width of the calyx cup through here, as compared to the Red King. There is a noticeable difference. May I also call your attention to the difference in the coloration of the antlers. May I also call your attention to a difference in the angle, the way the filaments grow out from the edge of the calyx cup, or receptacle. I think those are important.

Q. (By Mr. Griswold): Mr. Braun, could you very briefly label all parts to show the flower?

A. Well, we have, of course—this is the pistil coming up in the middle, the style, the ovary; this is the calyx cup, this is the calyx lobe; these are

(Testimony of Oscar Martin Braun.)

the petals. Then you have the stamens, of course, with the filaments and the antlers which contains the pollen.

Q. Where does the fruit form?

A. The fruit forms at the ovary.

Q. That exhibit is E-2.

A. Now, No. 3, I wish to present a picture again of some flowers, and I apologize that writing is not more legible. This is the Red King original tree, the Red King graft, the Sun Grand from Kozuki and the Sun Grand from Hagler—or from Hiraoka. Now, I wish to point out here, one of the things that we must consider in arriving at differences is the [293] fact that all these blossoms are what we call large showy blossoms. That in itself is not the complete matter. We have along with that what we call round petals, which you see here, and the elongated type of petal which I wish to bring out to you here.

Q. Identify it, please, as you point.

A. This petal you can see is elongated, and as you look at the various petals of the Sun Grand they are more elongated than the rounded petals of the Red King, which is an important characteristic, to differentiate between varieties.

Mr. Byrnes: No. 3 (handing to clerk).

The Witness: To further bear this out, we took some close-up shots. I had Mr. Bates take these shots, a student at the college who does photography work. We have here another picture of the Sun

(Testimony of Oscar Martin Braun.)

Grand from the Hiraoka ranch, which shows the elongated type of petal.

Mr. Shepard: Could we have foundation on that?

Q. (By Mr. Griswold): You were there, Mr. Braun?

A. Yes. I set the samples up, and I was always present and the specimens and samples never left my sight until we were completed with all of the examination and pictures.

Mr. Shepard: Thank you.

Q. (By Mr. Griswold): That is true of everything you are showing? [294] A. Yes.

The Court: You were present when all the pictures were taken?

The Witness: Yes, sir.

Mr. Byrnes: No. 4.

The Court: All right.

The Witness: Then I have one here from the Red King. Now, may I point out here that the petals are more roundish again, as shown in the photograph to the left.

Mr. Shepard: That is 5 you have.

The Witness: This is No. 5, this one right here. I have 6, which is petal flower from the Hiraoka planting, which again shows a more elongated type of petal.

Q. (By Mr. Griswold): Could you drop that a little bit? Thank you.

A. This is 6. Then I have a slide of the Hunter Red King tree, which I took April 5th, when I was

(Testimony of Oscar Martin Braun.)

asked to visit the Tagus ranch and made a selection there. I made a complete round, taking samples at the various places. I wish to point out in this particular tree, which is the original mutation tree, the first time I visited the tree during the blossoming time and during the early fruit there was a limb coming out here with a nectarine on it, which was about ten inches from the ground.

Q. May I interrupt? Can we use the other slide and get [295] a better picture?

Mr. Byrnes: I think we can on this particular shot. Let's try.

Q. (By Mr. Griswold): That is the same slide in the other machine. Will you proceed, Mr. Braun?

A. I wish to point out that in discussing why that limb was removed we do not know. None of the people I checked with admitting cutting it off. It was important to me because it had nectarines on it.

Q. You are referring to——

A. Up above; right there.

Q. You observed a nectarine growing out of that?

A. Blossoming with nectarines.

Q. When?

A. That was in April when I checked—in March and April.

Q. And later that limb had been removed?

A. April 5th that limb was cut off.

Q. How had it been cut?

A. It looked as if it had been cut with shears.

Mr. Byrnes: This is No. 7.

(Testimony of Oscar Martin Braun.)

The Witness: Now, I wish to show some pictures of some young fruit, which were taken April 5th by Mr. Bates, artificial light. I am not interested too much in the color here as I am with what we see. These fruit came [296] from the Tagus ranch. I wish to point out some characteristics which we mentioned the other day. You can see here the Tagus Sun Grand, you see what we call the filament from the style, the style isn't shown on this fruit. It happens these were all random samples, I did not select any sample. I took them just as they came. This next one is from the Hiraoka orchard.

The Court: Have we given that a number?

Mr. Byrnes: This is No. 8.

The Witness: You also notice the size, the comparative size of the fruit at this time, and also you can notice the styler hair growth at the end of the fruit which was mentioned the other day. I will put this one on. This will be Red King original.

Mr. Savage: Will you please give the numbers as you put them on.

The Witness: This will be, that is No. 9.

Mr. Byrnes: Mark it and I will put it back in.

Q. (By Mr. Griswold): Were the samples taken the same day?

A. Yes, sir. All the samples were taken on the same day. It is very important, otherwise it would not hold up. All the samples have to be taken at the same time, in the same manner, on the same day. You can't pick your samples. Now, there is

(Testimony of Oscar Martin Braun.)

no style here in this particular variety, the [297] cap was pulled off carefully, which I did that. I will leave that up there because I want to put up another here from Kozuki.

Mr. Byrnes: 11.

The Clerk: Wait a minute.

Mr. Savage: What is 10?

The Witness: This one, Red King, is 10. Now here again you can see the style of hair at the tip of the growth. You also notice that this fruit, these fruits are larger, much larger than any of the Sun Grand fruit, at this stage of development.

Q. (By Mr. Griswold): Which ones are larger?

A. The Red King.

Q. On the left? Which tree?

A. That was from the original mutation tree.

Mr. Byrnes: No. 9, No. 10 and No. 11.

The Court: All right.

The Witness: Now, June 28th, which was just about near harvest time, I made the rounds again and checked the fruit, and this is what I got.

Mr. Byrnes: No. 12 will be the next one.

The Witness: 12. I don't—I ran a sample through and ran the fruit through a saw to get a picture of the cross section in the upper two pictures, and the longitudinal [298] section of the fruit in the lower two pictures. That is Red King from the Hagler ranch. Well, this is not what I wanted here. I guess it is all right though.

Mr. Shepard: What slide numbers do you have there now?

(Testimony of Oscar Martin Braun.)

The Witness: I numbered these. This is No. 14 I am putting in now.

Mr. Byrnes: This one I have over here is 12.

The Witness: Yes, you keep that in there. Now, this is the random sample again of Sun Grand from Hiraoka ranch. I wish to point out there a characteristic which I found important in these two varieties all the way through. The Sun Grand seem to have more of an apex tip to it, in all cases, and it has more what we call a truncated apex, and more of a truncated base end of the fruit than we found in the Red King. The Red King was more rounded, and the tip, which we have a normal range that I could—if I was picking my sample I could pick out Red Kings that looked like Sun Grands, and I could pick out Sun Grands that looked like Red Kings, but when I took a normal sample at random, this is what I got.

Q. (By Mr. Griswold): What was the date that you took those samples and sawed them in half?

A. 6-28, I believe was a Saturday.

Q. That is June 28th? [299]

A. June 28th, yes.

Mr. Byrnes: This is No. 14.

The Court: I didn't hear you call 13.

Mr. Griswold: I don't believe there was any 13 offered.

The Court: Mr. Glover, did you get a 13?

The Clerk: The last I have is 12.

Mr. Byrnes: 13 I turned back. I am sorry, your Honor, I made a mistake.

(Testimony of Oscar Martin Braun.)

The Court: Then we will make a notation there is no No. 13. Then we will know there was one missing.

The Witness: There will be a 13, but it will be later.

The Court: There is no 13.

The Witness: This is 15. That shows the same general characteristics that I have mentioned about the Sun Grand, a little more pointed and it is more truncated at the base and at the apex, more compressed on the sides of the fruit, and also may I call your attention here again, and I know this occurs all the way through the season, which was more accentuated through Sun Grand, we had a greater even development of the fruit. In many cases half the fruit would be much smaller than the other side of the fruit.

The Court: In other words, it was not symmetrical?

The Witness: Sir?

The Court: It wasn't symmetrical?

The Witness: Yes, sir, it was not symmetrical.

This is [300] here——

Mr. Byrnes: This is 15, this is 14.

The Witness: Now, may I present No. 13, or shall I give that another number?

The Court: Well, have you got 13 now?

The Witness: Yes.

The Court: Well, all right, go ahead.

The Witness: Here we have four views of this

(Testimony of Oscar Martin Braun.)

same kind of fruit that I took. Now, as I mentioned before, I mention it all the way through my work, I will not take picked samples, because they don't mean anything. Here you have——

The Court: Now, just a minute. I have to warn you, all experts are alike. You make speeches. Now you have told us——

The Witness: Pardon me.

The Court: ——at least six times——

The Witness: Pardon me, sir.

The Court: ——that you took them at random and you have given us the reason. Once is enough.

The Witness: Pardon me, sir.

The Court: All right.

The Witness: I wish to show here the appearance of the fruit at this stage of development, which was just previous to harvesting.

Mr. Byrnes: 6-28, this is No. 16. Which will be the [301] next one? Sun Grand Kozuki?

Mr. Savage: What number?

Mr. Griswold: 16.

The Witness: I wish to show there the characteristic which I found more prevalent in this variety. They were not accentuated to the same extent as the Red King, more peaked and truncated at the base, more uneven development, fruit not so symmetrical, and more compressed type of a growth.

The Court: Just what do you mean by the word "compressed"?

The Witness: Laterally, the sides are more com-

(Testimony of Oscar Martin Braun.)

pressed laterally, like an apricot, the fruit, the cheeks of the fruit are not so rounded.

The Court: They don't bulge out?

The Witness: Yes.

The Court: I see. I just wanted to know what you meant by the word "compressed" used in that way.

The Witness: This is Hiraoka Sun Grand.

Mr. Shepard: Is that 17?

Mr. Byrnes: This is 17, yes.

The Witness: This is—now, I have one from the Sun Grand at Tagus ranch, which I wish to bring out that the apex tip of the fruit is a little bit larger and you have this compressed characteristic of the fruit. [302]

Mr. Byrnes: No. 19.

The Witness: 19 is Red King. Another sample showing—this is from the original tree of the Red King, showing a sample of the fruit. No. 20 is from the Sun Grand Tagus.

Mr. Shepard: The projectors have different lights on them?

Mr. Griswold: The projector on the right is better. I would make the suggestion that we just use it exclusively.

The Court: All right.

The Witness: The Sun Grand at Hiraoka ranch.

Mr. Shepard: Which number is that?

The Witness: 21.

Mr. Shepard: Could you show that 20 in this projector again?

(Testimony of Oscar Martin Braun.)

Mr. Byrnes: Glad to.

Mr. Griswold: I might say, Mr. Braun, if you have duplicates showing the same thing, I don't think it will be necessary to go through any duplication on the slides. Take whatever time you need, but don't show us the same thing.

The Court: Unless they are taken from a different angle or show something different, there is no use——

The Witness: Oh, yes, No. 22.

The Court: ——to duplicate.

The Witness: I wish to show you some side views of some of the fruit, the Hiraoka Sun Grand and the Red King. [303]

Here again may I point out the peakedness at the apex and the pointed fruit at the apex. Now, this is a sample——

The Court: You are covering it up.

The Witness: ——of the general fruit of that variety at the Hiraoka ranch.

Mr. Byrnes: 23.

Mr. Shepard: There are about 15 samples there?

The Court: Seventeen, I count.

The Witness: Here is a fruit from Sun Grand, and here again in setting these up I wanted to put the majority of the fruit of a certain type together showing the range or variation of the varieties as I found them. I find that there is more rounded fruit for the Red King than there is for the Sun Grand.

(Testimony of Oscar Martin Braun.)

Mr. Savage: Red King from what?

The Witness: From the graft.

Mr. Griswold: From the Hagler ranch?

The Witness: From the Hagler ranch.

The Court: All right. That is 22?

Mr. Byrnes: 22.

The Witness: Now that shows the top of Red King, that is 24.

The Clerk: The next I want is 23.

The Court: Just a minute, Mr. Glover is having difficulty keeping up. [304]

Mr. Savage: Where is 24?

Mr. Griswold: Identify the orchard, Mr. Braun, from which the sample was taken.

The Witness: The Red King orchard would be from the Hagler ranch. That is the orchard that I checked.

The Court: Well, the defendant or the brother?

The Witness: The Lyle Hagler ranch, the defendant.

The Court: All right. Go ahead.

The Witness: Next I have some samples of some leaves which I wish to show. 25 are some leaves from the Red King trees taken—the pictures were taken by my son Russell Braun, 7-5. Now, I wish to call to your attention here to the—and here again may I refer to the standards by Blake and Edgerton, leaves are important. In the study of leaves we have the petiole, we have the leaf glands which are normally located on the petiole or the blade near the base. We have the base angle of the leaf, we

(Testimony of Oscar Martin Braun.)

have the apex angle of this leaf. Will you please remember the general appearance of the apex angle of the Red King. Do you have the next one?

Mr. Griswold: How about the glands?

The Witness: I am not using the glands at this time.

Mr. Griswold: You have other photographs of that?

The Witness: Yes. Here is a picture of the Tagus Sun Grand, 7-5-58. You notice that the apex angle is not [305] so fine, it is broader, which is another difference between these varieties. May I have the next slide, please?

The Hiraoka Sun Grand shows the same general condition, the apex angle of the leaves are broader at this point. Those are the things I want to bring out here.

Color is a variable characteristic; it varies with the fertilizer that is used, and the richness of the soil, so I am not interested in color in these pictures, although there is a difference in color.

Now, we come to some more sections of the fruit taken during the harvest time. I have here the Hiraoka Sun Grand longitudinal and cross section taken 7-5.

Mr. Shepard: Number?

The Witness: No. 28. Now, another characteristic in determining varieties is color of flesh. There are a whole range or series of flesh colors, and to say that the flesh is yellow is a very general state-

(Testimony of Oscar Martin Braun.)

ment. There are different degrees of yellow, in combination with other colors. We have different degrees of the pink also around the pit and around the seed. This is the Sun Grand from the Hiraoka ranch, the sample taken 7-5-58. Here again you have pointed apex, you have irregular uneven development of the fruit showing up. Next picture.

Mr. Byrnes: Slide 29.

The Witness: The Kozuki Sun Grand, you have here again [306] some pointedness, you have some irregularity in the fruit, in the shape of the fruit. The longitudinal shape of the fruit is very important, also the transverse section is very important, because it shows you the prominence of the lip.

The Court: How does the color in the cavity of the fruit exhibited in this one compare with that in the other one, which are both of the same variety?

The Witness: The color is similar.

The Court: Would you say more on the yellowish than on the reddish?

The Witness: Well, the color will vary with the ripeness of the fruit also.

The Court: Well, but those were picked on the same day.

The Witness: Yes, the same day. This is Tagus Sun Grand sample. Here we have the type of apex which is very common in this variety. We also have the showing of the uneven development common in this variety.

(Testimony of Oscar Martin Braun.)

The Court: What I was asking is the color in the cavity. You call it cavity, and it is a good name.

The Witness: Yes.

The Court: Caused by the pit.

The Witness: In the pit cavity in this particular sample is a little different from the one Sun Grand which I just had.

The Court: Of course, I know we are limited as to color because of the limitation of the color spectrum. But are [306] they more on the yellowish or on the reddish?

The Witness: Around the tip, sir?

The Court: Yes.

The Witness: They are more pinkish red.

The Court: I see. All right.

The Witness: I wish to call your attention to the elongated type of pit. Now, here again the pits are very important in the diagnosis of variety, and in the examination of varieties. We have many shapes and many kinds of patterns—yes, what we call grooves, line grooves or pit grooves in the pit, and I wish to have you to look at the length of these pits here.

Mr. Byrnes: 31.

The Witness: Now, here we have the Red King graft which is from the Hagler ranch, more symmetrical, apex is broader, pit not so long, a little bit shorter than the one of the Sun Gold. Next please.

Mr. Byrnes: This is 32.

The Witness: This is from the original tree. I

(Testimony of Oscar Martin Braun.)

find that as far as the color around the pit is concerned there was not much difference. I could find ranges in Red King as well as I could in the Sun Grand, and I couldn't use that to differentiate so much between them. Next.

Mr. Byrnes: 33.

The Witness: Here is another picture of the Red King [307] original. There was one thing I noted in the pit, which I will show again, was that the pit had a greater wing and tip was more to one side, the apex tip was more to one side of the center axis, than was the Sun Grand.

Mr. Byrnes: 34.

The Witness: Red King orchard. We do have these tips occurring in both varieties, but they are less prominent in the Red King. One more.

Mr. Byrnes: This is 35.

The Witness: Now, this bears out, shows a more accentuated tip, and also shows a longer pit, which is characteristic for the Sun Grand over the Red King, a longer pit.

Mr. Byrnes: 35.

The Witness: Now, to check on this variety, I took pictures—had pictures taken—36, 37, 38, 39, 40, at a different period because I was interested to see what changes took place in these varieties during the growth period, so these pictures were taken a week later, 7-12. This is Sun Grand, representative sample again.

Mr. Griswold: Which orchard?

(Testimony of Oscar Martin Braun.)

The Witness: This is from the Hiraoka orchard at Fowler, showing the larger apex tip, the uneven development of the fruit, not so symmetrical, the longer pit. Next one, please.

Mr. Byrnes: 37. [308]

The Witness: The Kozuki Sun Grand shows some tip here, it shows more roughness at the suture, it also shows the long pit. Next, please.

Mr. Byrnes: 38.

The Witness: Sun Grand at Tagus, which is right close to the location where the Red King mutation was found, shows a more accentuated type of elongated type of fruit with a greater percentage of the fruit having this tip, which is characteristic of the Sun Grand fruit. Also it shows some differentiation in the ripening on the half of the fruit.

Mr. Griswold: Can you point that out?

The Witness: You can see in this particular fruit right here, it shows here; although I am not interested so much in color here as I am in the section, the shape of the fruit and the shape of the pits. This is what we call a pointed wedged base, and this fruit is characteristic of these characteristics, where at the base end of the fruit, where the stem enters the fruit, it is wedged and the shoulders are high, they are not rounded. Next, please.

Mr. Griswold: Will you compare that to the Red King?

The Witness: In the Red King you will find the shoulders are more rounded. This is Red King original from the mutation tree. You do find some

(Testimony of Oscar Martin Braun.)

pointed fruit, I agree there. There is an overlapping in this variety [309] of this characteristic, but the fruit is generally more round, at both the apex and the base end, the seeds are not so elongated, they are stubbier, they are shorter, they appear to have more width at the stem end of the pit which goes through and matches the greater width of the fruit itself at the base end. Next, please.

Mr. Byrnes: 40.

The Witness: Here we have a section of the Sun Grand at Kozuki, the same day. This brings out very clearly the difference in the ripening of the fruit in those two unequal halves which mature differently. Here again it shows—here again we have the pointed seed, which is longer.

Mr. Griswold: Just one moment, Mr. Braun. You mean that one side ripens before the other?

The Witness: Well, they develop differently, yes, sir. The fruit develops unevenly. I won't say all of it does, but some of it does, as shown here. This happens to be a very good example of what we are talking about there. Next, please.

Mr. Byrnes: That is it. That is 40.

The Witness: All right, here is 41 and 42. Next I wish to show a side view of some of the Tagus Sun Grand and the Red King Sun Grand, the fruits being in the same general location. This is what I call typical Sun Grand color, a yellow orange bronze type of color, typical of Sun Grand; [310] pointed fruit, truncated at the base and at the apex. Typical. It is a good variety of fruit, good eating qualities,

(Testimony of Oscar Martin Braun.)

but this is typical of the shape of the fruit and the color. Next.

This is Red King graft; you notice here the fruit is generally more rounded at the apex, wider at the base, not so elongated.

Mr. Byrnes: No. 42.

Mr. Griswold: Mr. Braun, do the photographs show—I suppose the best test of coloration is the fruit itself?

The Witness: Beg your pardon?

Mr. Griswold: Am I correct that the fruit itself is the best test of the coloration?

The Witness: Yes, it is. Now, Kodachrome colors never come true, we all know that, and of course the fruit itself is the best index to that. However, I wish to point these out as we go along, these things were proportional and I agree with you there, it is true that the fruit itself is the best index. This is some whole fruit of the Red King, 43. Would you show these?

Mr. Byrnes: 43.

Mr. Shepard: Which orchard?

Mr. Byrnes: L. A. Hagler.

The Witness: The color of Red King, while usually redder than the Sun Grand, also has a normal curve of [311] distribution; most of the fruit will be red. However, you will find, and this is confusing to many people, but in the normal course of events you will find color in some of the Red King which will be similar to some of the color of the Sun Grand.

(Testimony of Oscar Martin Braun.)

Q. (By Mr. Griswold): Will you explain the difference in color in the tree locations, I mean the location of the fruit on the tree?

A. Yes. Where I go in to pick a sample of fruit I don't just pick the fruit on the outside, I don't pick the——

Q. I didn't ask that. What relation of the——

A. No, the highly colored fruit will be on the outside of the tree, or on top of the tree.

Q. Where the sun strikes it?

A. Yes. You will also find that color will vary with nutrients in the trees. For instance, increased carbohydrates will give you an increased color in the trees, you have these factors, but other things being equal, the Red King normally has much greater color than the Sun Grand. Now, the point I wish to bring out here is that in this apex shot, this is a top view, looking down on the fruit. I wish to have you notice that there is very little point or apex tip and that the suture is shallow, comparatively speaking, not very deep. Next, please.

Mr. Byrnes: 44. [312]

The Witness: Red King original, showing the typical appearance of the fruit, longer, the suture not too prominent, the lip not too prominent, the fruit is rounded. Next, please.

Mr. Byrnes: 45.

The Witness: Sun Grand from the Tagus ranch. You immediately see here a difference in the development of the fruit, it has similar color but the

(Testimony of Oscar Martin Braun.)

fruit is different. It shows a little more tip to the fruit, it shows a little more uneven development. Next, please.

Mr. Byrnes: 46.

The Witness: Sun Grand Kozuki. This fruit shows that compressed lateral pressure on the cheeks of the fruit; the suture is deeper in practically all cases. Next, please.

Mr. Byrnes: 47.

The Witness: Here we have another picture of the cross section and longitudinal—no, these are all cross sections, I beg your pardon. These are all cross sections of the fruit. There is one thing that I noticed in the Red King, the width of the seed, the thickness of the seed, of the pit—not the seed, make that correction, the pit was greater in the Red King than it was in the Sun Grand. Also you have here what you call—in truth, we have different degrees of freeness of the fruit, between cling and free, and when the fruit—when the pit comes away entirely from the fruit, that is spoken of as air free, as far as the [313] freeness of the pit goes. Do you have any more?

Mr. Byrnes: No. 47.

The Witness: All right. Now, I wish to project a slide on the—48—on the Red King leaf showing the—this again was taken—this picture was taken by Mr. Bates with artificial light. I am not interested in the color. Besides we took—

Mr. Shepard: This is number—

Mr. Byrnes: 48.

(Testimony of Oscar Martin Braun.)

The Witness: Here again may I refer to the publication by Dr. Gregory on the Taxonomic Value and Structure of the Leaf Glands which is not in entire agreement on the position of the leaf glands; whether the leaf glands are reniform, or globose, or whether or not there, it has been found that the number of the leaf glands also varies as compared to the accepting the report in the Sun Grand patent write-up as having an average of four glands, and counting 66 leaves, I found an average of 2.25 glands in the Red King, which I think is a significant difference as far as the number of the leaf glands is concerned. As far as the position of the leaf glands go I found an average number of the leaf glands equally on the petiole as on the blade of the leaf, and I believe in the Sun Grand—if I remember correctly, that most of the glands were on the leaf blade and they average four, as against 2.5 for the Red King. [314]

Mr. Griswold: Mr. Braun, when you refer to the number of glands as four on plant patent 974, you are referring to the patent?

The Witness: Yes, sir, with the average. The number will vary, in this case it varies from two to five, but the average was 2.5, which I think is significant as compared to four for the Sun Grand.

Mr. Byrnes: 48.

The Witness: 48. The next pictures will show some of the pits.

Mr. Byrnes: This is 49.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Date?

The Witness: It should be, I believe 7-14, but the 4 was made to look like a 9.

The Court: All right.

The Witness: Sun Grand, Tagus ranch, elongated type of pit, the general width at the base of the tip, and location of the pit. Sun Grand Kozuki.

Mr. Byrnes: That is 50 now showing.

The Witness: It is characteristic with most of the pits to have some of the discoloration from the pinkish or reddish color around the pit.

Mr. Savage: What happened to 49? May I ask what happened to 49?

Mr. Byrnes: He is showing 49; and this is 50 here. [315]

The Witness: Next, please. Red King. This is more typical of the Red King pit; it is a shorter type of pit. It has more width of diameter; it has a little more ring to it here than the Sun Grand.

Mr. Byrnes: The Sun Grand is over there on the other side.

The Witness: This brings out the point that you have more of an acute angle here in many of these than you do in the Red King. And may I bring this point out here again, here you have a variance as you do in all these characteristics, a variation, but you find a general characteristic which this is for the Red King, and which the elongated pit and the more acute angle here is for the Sun Grand. Next, please.

(Testimony of Oscar Martin Braun.)

Mr. Byrnes: That is 52 now showing.

Mr. Savage: Where from?

Mr. Griswold: Will you identify it?

The Witness: This is Hiraoka Sun Grand orchard, the "T" stands for "tree," and "H" stands for "Hiraoka."

Mr. Griswold: That denotes the same point?

The Witness: The same point regarding the seed. Now, these are all duplicates of those.

Now, 7-20, the last day I visited to pick up fruit samples was 7-19, July 19th. May we show these? What was the last number?

Mr. Byrnes: 52. This is 53. [316]

The Witness: 53. Now, this group was picked on Saturday, July 19th, the last picking I made of any fruit from any of the trees. This was taken from Sun Grand orchard at Hiraoka's place. Now, Mr. Hiraoka, Harry Hiraoka, started picking his fruit a little bit earlier. The reason why he said he was doing that was because he had irrigated his trees and if he didn't pick his fruit he thought he would have more split pits, so he was going to pick a little earlier. So when I went around to get this fruit on the 19th this fruit was the fruit that was left on the tree, because there is always some fruit which the pickers leave, and I thought the fruit was typical. Next, please.

Red King fruit, 7-20, from the orchard, Hagler's.

Mr. Byrnes: Oh, may I have that number back, please.

(Testimony of Oscar Martin Braun.)

The Witness: May I bring out here the characteristic color which is so characteristic of this Red King mutation, which goes along with the general shape and size of the fruit, and I did find also that this general increase in size of the fruit was characteristic for this variety. Here we have the Sun Grand orchard at Hiraoka.

Mr. Griswold: Were those samples taken on the same day?

The Witness: Same day, 19th of July. Next, please.

Mr. Byrnes: This is 55 here.

The Witness: Sun Grand Kozuki, the fruit at the Kozuki orchard had a little more color, in fact it had more red [317] color than any of the other Sun Grand plantings. Here again, however, I wish to emphasize the elongated type of fruit, the uneven ripening of the fruit, and the fact that the fruit is different in shape.

Mr. Byrnes: I guess it won't make much difference, it is **backward**.

Mr. Griswold: Take it out and show it right.

The Court: It is upside down. This is the same thing you had on before.

Mr. Byrnes: It looks the same, but it is a different picture.

Mr. Shepard: What is the number?

Mr. Byrnes: 56.

The Witness: Red King.

Mr. Shepard: 56?

Mr. Byrnes: This is 56.

(Testimony of Oscar Martin Braun.)

The Witness: Red King. Next, please.

Mr. Shepard: Which orchard?

The Court: He doesn't know.

Mr. Savage: From which orchard?

Mr. Byrnes: Red King from the Hagler orchard.

The Court: All right.

The Witness: Is this 57?

Mr. Byrnes: This is 57. Would you like to see Sun Grand in the other machine? [318]

The Witness: Yes. Here again we have more orange color with the red, where you have a redder fruit in the Sun Grand, but coupled along with that you have a rounder fruit in the Red King than you have in the Sun Grand.

Mr. Savage: May we ask you to put that 57 on the same slide?

The Witness: Put 57 on the same slide.

The Court: All right.

Mr. Griswold: Reverse them.

Mr. Byrnes: These things work differently here.

The Court: The light is better on that one. Put it on the other slide, the light is better for comparison.

The Witness: Next.

Mr. Byrnes: 57 was last.

The Witness: 58. I wish to show sections of the Red King and the Tagus Sun Grand, and 59 I wish to show a composite picture of the different selections.

(Testimony of Oscar Martin Braun.)

The Court: All right.

Mr. Byrnes: 57.

The Witness: The Tagus Sun Grand, the Red King.

Mr. Byrnes: 58.

Mr. Griswold: Would you designate which is which?

The Witness: The Red King is the upper fruit here, and—can you get that a little more distinct?

Mr. Byrnes: That is all I can get. The machine should [319] be pulled back.

The Witness: I wish to bring out here the thickness of the pit, the diameter; the pits in the Red King are definitely more round and wider, thicker than the pit in the Sun Grand. I hope to bring that out here in this section of the fruit. Here we see again the typical shape of the two varieties, the Red King being more rounded, wider at the base; the Sun Grand being more truncated at the base and having a more acute angle at the apex.

Mr. Griswold: Does that picture, while you have that there, show the angle of the base, that is, the cavity where the stem grows out of?

The Witness: It does, and of course that is right here. This angle right here. The cavity here is deeper than is the cavity of the Red King.

Mr. Shepard: What is the date of that picture?

The Witness: Beg your pardon?

Mr. Shepard: Date?

The Witness: This picture was taken—I took that in, I think it was about the first week in Au-

(Testimony of Oscar Martin Braun.)

gust. I had to go to a shop, machine shop, to put my fruit through a saw to get that, it is pretty hard to do, and I did that—I think it was the fruit which was selected at the last picking, mature fruit, but I did it just to see what I could get out of it, because I was trying to, here again, look for differences [320] in these varieties. Next.

Here we have a composite set of samples of fruit from the Red King, Tagus Sun Grand, Kozuki Sun Grand, and Hiraoka Sun Grand. Now, here again the average fruit for the Red King was larger on the whole; it was more rounded, not so elongated which is shown here; the seeds being wider also, and larger, and that was borne out when I took some samples of 20 seeds of each of these different varieties, I took a random sample of seeds and weighed them, and got a greater weight for the Red King than I did for any of the other seeds, comparing the weight of the pit.

The Court: How much, in milligrams?

The Witness: Grams.

The Court: Grams?

The Witness: Yes, sir. Mr. Griswold has that information, I believe.

The Court: Well, if he has it, you have to testify to it.

Mr. Griswold: Proceed with the slides. Let's try to finish the slides first.

The Witness: I have four more slides. What number was the last number?

(Testimony of Oscar Martin Braun.)

Mr. Byrnes: 59.

The Witness: 59. 60, 61, 62, 63, 64, 65, 66.

Mr. Byrnes: This is 60. [321]

The Witness: I am not interested in the color here. I am interested in the general shape of the pits, the high star, the stem star. Note the sides of that. Note the width across the pit. Next, please. Red King.

Mr. Byrnes: 61.

The Witness: Next, please.

Mr. Griswold: Well, what is your comparison?

The Witness: Well, can we have those slides again? There is a note here, there is more width across these pits than there is for the Sun Grand.

Mr. Byrnes: I will put the other on the other projector.

The Witness: This distance is greater than this distance. The seed is—the pit is different; it shows a different characteristic in shape, and this is looking down on top of the seed. I stuck them in some clay, little pieces of clay. Next, please.

This is Kozuki orchard, Sun Grand pits. This was taken 8-2-58. Next one, please.

Mr. Savage: Was that 62?

Mr. Byrnes: This is 62 now showing, the first one. 63 now.

The Witness: Sun Grand from Hiraoka orchard, 8-2-58.

Mr. Griswold: These slides show the same——

The Witness: Yes, same characteristics. Next. Red King again. [322]

(Testimony of Oscar Martin Braun.)

Mr. Byrnes: 64.

The Witness: Next, please. Now, to go down the line for different characteristics again, I cracked the pits and I looked at the seeds, the kernel.

Mr. Savage: What number, please?

Mr. Byrnes: This is 65 now showing.

The Witness: If you stand, if you look at these carefully, these low striations in the seed, note the general length, the width, and where the apex tip is centered. Next, please.

Notice that these seeds appear to have a hooked apex angle there, and they appear to be shorter, they are not so long, which bears out in the length of the pits again, in the size of the pits. These characteristics are there, they are different, and these characteristics show here also an aid in determining one variety from another. Next, please.

Mr. Byrnes: Now, that's it.

The Witness: Let's see, now; what else do I have here.

Mr. Griswold: Mr. Braun——

The Witness: Oh, I have one more—three more slides I wish to show you, 67, 68 and 69.

The Court: All right.

The Witness: I wish to say here, your Honor, that more slides than these were taken, many of the slides were of [323] little value as far as presenting a case, but——

The Court: Wait a minute. Wait a minute.

The Witness: ——I tried to get certain things. This particular picture was taken of the original——

(Testimony of Oscar Martin Braun.)
of the ground at the original mutation Red King tree in the Hunter orchard.

Mr. Griswold: What date?

The Witness: The date was 7-19.

The Court: All right.

The Witness: It was the last day I made the visit.

The Court: All right.

The Witness: I was interested in this because—I was interested to see how much fruit dropped off the tree, was on the ground. Next slide.

This picture was taken under one of the trees at the Tagus ranch, showing the amount of Sun Grand fruit under the tree on the ground, showing here again a characteristic that the Sun Grand variety has a tendency to drop more readily near the end of the season than the Red King variety. Next, please.

Here is another picture showing the fruit on the ground.

Mr. Griswold: Which orchard?

The Witness: That was also in the Tagus orchard.

The Court: All right.

Mr. Griswold: You say those are not all the pictures you [324] took?

The Witness: Well, I have other pictures here, but I question their value as far as I am concerned.

Mr. Griswold: If the Court please, I suggest this is a good breaking point here.

(Testimony of Oscar Martin Braun.)

The Court: Yes, I was waiting for the opportunity. All right, gentlemen. Two o'clock.

(Thereupon, at 12:25 p.m. a recess was taken until 2:00 p.m. of the same day.) [325]

Afternoon Session—2:00 P.M.

The Court: All right, we will proceed, gentlemen.

OSCAR MARTIN BRAUN

a witness for the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Griswold:

Q. Mr. Braun, in addition to the photographs which you have testified to, you also collected samples of the fruit? A. Yes, sir; I did.

Q. And you kept that in what place?

A. Well, I kept samples at the Hagler Packing Company storage place, and we also took some samples that were frozen, Mr. Houk referred to me a place in Visalia. Then I also took samples to our freezing unit at the college. I have a class in fruit entomology and we use samples in there.

Q. Do you have any samples that are not frozen?

A. Yes, sir; I do.

Q. And from which orchard?

A. I have samples which are not frozen from all of the orchards.

(Testimony of Oscar Martin Braun.)

Q. And in your opinion, is there a difference in the frozen and non-frozen samples? [326]

A. Yes. I will say that, as was mentioned before by previous witnesses, that frozen fruit takes on different characteristics. However, the general shape and appearance of the fruit from the standpoint of the shape would remain similar, unless it happened to break down. The internal part of the fruit upon freezing breaks down quite rapidly.

The Court: All right.

Q. (By Mr. Griswold): I am going to show you, Mr. Braun, Plaintiff's Exhibit 8, and ask you to examine this photograph. Could you, in your opinion, based on what you know about nectarines, appearances, varieties, make an identification of the fruit depicted in that picture absent the designation, of course, that is on the picture?

A. No, I don't think I could, to be sure.

Q. Why not?

A. Well, it is very difficult—I mean the—it is possible when you consider the variation that we find in all fruit varieties to be sure that you have a typical representative sample first, and this certainly doesn't show up as Red King, as I know it.

Q. Leave that open. I set on the witness stand a lug box containing some fruit, and will you please identify the fruit, where you——

A. Well, I have—— [327]

Q. ——got it, and where you preserved it?

A. I have, in the bottom of the box I have written Red King from the original tree, picked on

(Testimony of Oscar Martin Braun.)

July 19, 1958, and that looks typical to me for the variety Red King.

The Court: Just a minute. All right. I notice you have different sizes.

The Witness: Yes, there are some different sizes that you will find. However, I don't think this variety belongs in there, although it could be.

Mr. Griswold: Could we mark this?

The Court: Where are you going to keep them? They are going to spoil; you can't keep an exhibit like that. We have no refrigeration provisions in this building.

Mr. Griswold: Now, the small basket, is that also from the original tree?

The Witness: The small basket is from—I have it tagged here from the Red King original tree, yes.

Mr. Griswold: If the Court please, we appreciate the transitory nature of this evidence, but we do feel it is the best evidence, the economic aspect, namely the fruit itself, and we have comparative samples from the other trees.

The Court: Well, the point is, however, they will spoil and you have to throw them out. How can you keep them?

Mr. Griswold: Well, the witness has informed me that he can keep them for several more months in refrigeration. [328]

The Court: Of course, we can identify a small number and trust him to keep them in a refrigerator for a possible appeal.

(Testimony of Oscar Martin Braun.)

The Witness: I can keep them a few more months.

The Court: This wouldn't be a regular exhibit; you couldn't send this up to the Court of Appeals in San Francisco a year from now in order to have a sample. I have no objection to receiving some, and they will probably remain sweet for awhile. As I said, the only fruit I ever had involved—it seems to me that the witness takes a bit of fruit apart, takes pictures, and describes them in full, why, that would be sufficient. The witness can describe them.

The Witness: Well, this——

The Court: All I am saying is, I don't see how we can make an exhibit of them. The record will merely show that the fresh fruit was exhibited to the Court, and the Court couldn't receive them as exhibits because we have no way of storing them to preserve them, even during the course of the trial.

Mr. Shepard: I would go along; we have no objection to the Court observing them here in the court room, and all parties.

Mr. Griswold: For convenience of reference, could I mark these for identification?

The Court: You know the old joke, the jury consumed [329] the evidence. We might all consume the nectarines. I think that is about all, and the witness can describe them.

The Witness: Well, the——

Mr. Griswold: First, I would want to mark this then for identification.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Well, can't counsel just set his exhibits along the rail here, and he can contrast as he goes along.

Mr. Griswold: I want to take one at a time, but I will do that.

The Court: All right.

Mr. Griswold: Could we mark that as an exhibit, so we can refer to it?

The Court: I will tell you what you might do, if you have a cellophane bag, we might take one and use it as a sample.

Mr. Griswold: We could get some.

The Court: You can tie it up and have it as an exemplar and throw it out when it gets moldy. Get some of those little cellophane bags. All right, let's go on. Let's not take too much time. Then we will take a representative sample of each of them and put them in a bag, and that will be the exhibit, rather than the lug.

Q. (By Mr. Griswold): I show you a second collection of fruit, and ask where you obtained those? [330]

A. Well, I obtained these from the Red King planting in the Hagler orchard.

The Court: Pick the best one, pick one of each, pick a representative one from each. All right.

Q. (By Mr. Griswold): I show you another box of the fruit, maybe we better dump these, and——

A. This is from the Tagus Sun Grand orchard, beginning to spoil.

(Testimony of Oscar Martin Braun.)

The Court: Those have begun to spoil.

The Witness: That is typical, I would say that is typical fruit for that planting.

Mr. Griswold: We will have the bags, your Honor, and after the bags get here we will take a representative sample.

The Court: All right. Have you more?

Mr. Griswold: We have some more from the Kozuki and the Hiraoka.

The Court: All right. Put them on top of each other.

Mr. Griswold: From the Tagus Sun Grand. Perhaps we can mark this as the next exhibit, the Tagus.

The Court: We will pick one from each and put it in a sack and mark it.

Q. (By Mr. Griswold): Now, Mr. Braun, directing your attention to the fruit from the original tree, Red King, will you take one [331] of the fruits and explain the characteristics of that fruit as you found them in your investigation?

A. Well, I found that this color and shape for the fruit is typical. It has a tendency to be rounded; it has a tendency to have this red color, which is to my knowledge typical of Red King; and the seed which is shown here is typical from the standpoint of the Red King variety being full and roundish and not elongated. It has light pinkish color around the pit cavity, not very much, but light pinkish. The cavity itself is wide and the shoulders are flared and rather rounded.

(Testimony of Oscar Martin Braun.)

The Court: How would you characterize the meat of the fruit?

The Witness: Well, I——

The Court: Firm?

The Witness: Yes, the meat is firm, your Honor. I would say it is still firm.

The Court: You tempt me. I might eat some of them; I am very fond of them.

The Witness: It loses its flavor but I don't think it would make you sick to eat it. So I would say that this is a normal fruit.

Q. (By Mr. Griswold): Now, in your test you also examined the pits and the seed of the [332] pits? A. Right.

Q. And also the subjective test of tasting the seed?

A. In tasting the seed for bitterness, which is a qualitative factor and would vary on the person's ability to recognize that bitterness, but the test that I made and tasted, the seed that I tasted were more bitter from the fruit of the Red King than they were from the pits from the Sun Grand.

The Court: It is not edible, so what significance does the fact it is bitter have?

The Witness: There again, your Honor, there is a variation which is recognized as being important in discerning one variety from another, and if we go back to that bulletin on the standards of classification, I believe that would be listed there, and that is recognized by systematic pomologists as a factor which is useful, and again, adds to those

(Testimony of Oscar Martin Braun.)

which may help to determine one variety from another. And I believe, if I am right, I think it is the amygdalin, is it, in the seed that causes that bitterness. I believe it is amygdalin sulfate.

Q. (By Mr. Griswold): Directing your attention to the Tagus Sun Grand variety which you have in exhibit the third, I believe——

A. Well, I have in front of me——

Q. ——will you pick out a typical variety? [333]

A. I have in front of me some typical representative samples of the Sun Grand from the Tagus ranch.

Q. And will you——

A. This fruit was picked at random, and—I'll get a knife here. One of the first things that is characteristic for this variety is, as I mentioned, it is truncated at the cavity end of the fruit. It has sharp shoulders that are not wide. It also has a normal apex tip to it. It also has a normal unequal sides to it. It is fuller on one side than it is on the other. The color is characteristic, orange yellow with a bronze type of an overcast. These characteristics are normal for this variety.

The Court: How about the pit?

The Witness: Well, this pit, I think, shows some variation from some of the others we looked at, but I think it is a little bit longer than the ones from the Red King. There is some pink around the seed.

The Court: All right.

(Testimony of Oscar Martin Braun.)

Q. (By Mr. Griswold): Mr. Braun, I hand you a plastic container and ask you if you could take several representative samples of the Sun Grand from the Tagus ranch.

A. We should mark that with something.

The Court: Well, the Clerk will tie it and give it a number. [334]

Mr. Griswold: We will offer it in evidence.

Mr. Shepard: We will object to the offer in evidence, for the reasons your Honor stated. I don't object for identification.

The Court: Well, we will receive it. Let it remain as it is. It will serve until the case is closed.

The Clerk: Exhibit F.

(The nectarines referred to were marked as Defendant's Exhibit F, and were received in evidence.)

Q. (By Mr. Griswold): Now, can you pick out the same number of representative samples of the Red King?

A. I will just take three right in front of me here. They are typical, they are from the lot that was taken representing the variety.

Mr. Griswold: We will offer in evidence three from the box the witness designated—

The Witness: Red King original tree picked on July 19th.

The Clerk: What was the first?

Mr. Griswold: Sun Grand from the Tagus ranch.

(Testimony of Oscar Martin Braun.)

Mr. Savage: What exhibit is that?

The Clerk: The second will be G, the Red King.

(The nectarines referred to were marked as Defendant's Exhibit G, and were received in evidence.) [335]

The Court: That is from the Hagler ranch, is that correct?

The Witness: The Sun Grand is from the Tagus Ranch, and the Red King is from the original mutation tree on the Hunter ranch.

The Court: On the Hunter ranch, all right.

Q. (By Mr. Griswold): Now, you also have another box and you testified that that was from the trees on the Hagler ranch, that Mr. Hagler had propagated from the original tree?

A. Yes, sir.

Q. Will you pick out three representative fruit?

A. I will say here again——

Q. That has got a mold on it.

A. Some of these are beginning to spoil.

Q. Take just two of them then.

A. This fruit won't keep forever, I know that.

Mr. Griswold: We will offer in evidence——

The Court: All right, it may be received as I, and those come from?

The Witness: Those come from the Red King planting in the Hagler orchard, the Hagler tree. They were picked on July 19th.

Mr. Savage: Is that H or I?

The Clerk: The three bags of fruit, F, G, H.

(Testimony of Oscar Martin Braun.)

(The nectarines referred to were marked as Defendant's Exhibit H, and were received in evidence.) [336]

The Court: Oh, I am sorry. It was my error; I thought we started with H. All right.

The Clerk: This is from which ranch?

The Court: This is from the Hunter ranch.

Mr. Griswold: The last exhibit, if the Court please, was from the Hagler ranch.

The Court: Hagler, I am sorry. The other one was from the original sport, as it has been called.

Q. (By Mr. Griswold): You also have samples of both of the other trees you testified to this morning? A. Yes.

Q. They wouldn't add anything, or would they, Mr. Braun, to the representative samples which you have?

A. I don't think they would. I think they would simply confirm the differences in the general characteristics between the two fruits.

The Court: All right.

Q. (By Mr. Griswold): This morning you testified that you had weighed some of the seeds from the different samples?

A. Yes, sir, I took a random sample, I think I took ten pits from each of the different lots and weighed them to confirm my information that the Red King pits were larger.

Q. And you made a report on your findings of the weight [337] in grams? A. Yes.

(Testimony of Oscar Martin Braun.)

Q. And am I correct that you have before you a result of that work showing which trees?

A. Well, I have samples that were taken from the various trees in the—which were selected and also from the orchard.

Q. And what were your findings on that?

A. For the Sun Grand varieties from the Hiraoka tree ten seed weighed 63.5 grams; random samples from the Hiraoka orchard ten seed weighed 63.3 grams. The Sun Grand variety from the Tagus tree, ten seed weighed 57.2 grams; from the Tagus orchard ten seed weighed 68.1 grams. From the Sun Grand of the Kozuki tree ten seed weighed 58.9 grams, and from the Kozuki orchard ten seed weighed 62.4 grams. From the Red King tree at the Hunter ranch ten seed weighed 72.75 grams; from the Red King tree, from the Hagler tree, ten seed weighed 67.7 grams, and from the Hagler orchard ten seed weighed 72.1 grams, which shows considerable weight—well, let's see, there is 63.5 is the largest weight as against 72.75 grams, which is considerable. I think it is sufficient to be recognized as evidence indicating the difference between these seeds.

Mr. Griswold: We will offer in evidence the report.

The Court: It may be received as a summary. What significance has the weight—— [338]

The Witness: Well, your Honor——

The Court: ——as identifying a particular fruit?

(Testimony of Oscar Martin Braun.)

The Witness: We recognize in the study of varieties there is a variation in the size of the pits and this is a significant factor, and what I wanted to establish was that the Red King pits through the character of the pit showed more weight than the Sun Grand variety did.

The Court: I see. All right. Is that one of the factors which authorities recognize——

The Witness: It is a fact which——

The Court: ——and take into consideration in comparing trees?

The Witness: ——in my judgment, is a factor which should be considered along with the others.

The Court: All right.

Q. (By Mr. Griswold): Did you make any other measurements in your study?

A. Well, yes. I made measurements of various kinds.

Q. You measured the pit, did you not?

A. Beg pardon?

Q. You measured the length and width of the various pits? A. Yes.

Q. And did you find anything significant there?

A. Well, I believe I found a difference there also. [339] I don't have the data on hand to look at, to refresh my memory, but I believe I did make some measurements of the length and width.

Q. I show you a summary entitled Data on Pits, and ask if you prepared that?

A. Yes, I did.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Were you going to introduce that, counsel?

Mr. Griswold: Only as a summary.

Mr. Shepard: Well, wouldn't it be nice if I could see it, too?

The Court: Well, the witness maybe testified to this before and that may be offered. I think you should see it.

Mr. Shepard (After examining): Go ahead.

Q. (By Mr. Griswold): What were your findings in that regard?

A. Well, in this regard, the length of these samples from the standpoint of millimeters, the Kozuki Sun Grand seed, the pits averaged 33 millimeters long and 27 millimeters wide; the characteristics were mostly coarse from the standpoint of the pit grooves and the line grooves. Kozuki Sun Grand orchard, that was from the tree, were 35 millimeters by 28 millimeters wide, and the characteristic markings were mostly coarse. The Hiraoka Sun Grand tree, 33 millimeters long and 25 millimeters wide, many of the markings were medium and coarse. Hiraoka Sun Grand orchard, 35 millimeters [340] by 26 millimeters, and the markings were mostly coarse, some medium. Red King original tree on the Hunter ranch, the length 34 millimeters and 29 millimeters in width, the markings mostly coarse, some medium. This brings out the difference there that was noticed in the previous presentation, that these pits are wider. The Red King graft 37 millimeters by 28 millimeters,

(Testimony of Oscar Martin Braun.)

mostly coarse, some medium. The Tagus Sun Grand tree 36 millimeters long, 25 millimeters wide, about even coarse and medium marking. The Tagus Sun Grand orchard 35 millimeters by 24 millimeters, mostly coarse with some medium grooves.

Q. So that that——

A. So here again we have an indication of a variance in the dimensions of the two varieties on the basis of their pit measurements which I would like to—I think this is of importance and would like to present.

Q. Now, in addition to a physical study of the characteristics which you have described, did you also prepare certain material and charts relative to the pack-out, at the packing house, which indicates the relative sizes of the various Sun Grand and Red King?

A. Yes, I did. There is a carry-through of course, in the larger fruit we find larger pits, and this characteristic, of course, carries through in the larger fruit, and from a farming point of view it is very important to check [341] the pack-out sizes of the different varieties, and so I contacted the packing house foreman at the Barr Packing Company, and asked him if he would give me a statement on the pack-out for the Sun Grand nectarines on Mr. Kozuki's ranch, which he did, and I also obtained a packing house statement from Mr. Burns on the Clinton Hagler pack-out of Red King. And I also obtained a packing house state-

(Testimony of Oscar Martin Braun.)

ment from the Tagus ranch foreman, Mr. Keegan, who gave me a pack-out statement, and in those statements I have the date of picking, the number of boxes of fruit picked, and the pack-out in sizes for the entire group of fruit.

Q. Now, when you speak of size of pack-out, what do you mean?

A. Well, from the standpoint of marketing fruit we have certain legal requirements and sizes that are allowed, vary three-eighths of an inch in diameter from one size to another.

The Court: Those are regulations of the State Board of Agriculture.

The Witness: Yes, and so many fruit to a box; in other words, if we say 60, that means 60 peaches to a L.A. lug, Los Angeles lug, or to a lug box.

Q. (By Mr. Griswold): In nectarines, starting from the littlest grade, up to the biggest grade, what is the designation? [342]

A. Well, might be 96, 88.

Q. That is the larger?

A. The smallest ones, going from the smallest ones up to the largest one, 80, 74, 70, 64, 65, you find various numbers depending on the size and kind, in order to make a tight pack, going down to 48, I believe, for the large size fruit.

Q. Mr. Braun, I show you two series of charts, three in number, these are duplicates, are they not?

A. I think so, yes.

Q. Now, showing you this first chart, pack-out size 60, 64, 65 to 48.

(Testimony of Oscar Martin Braun.)

Mr. Griswold: First, if the Court please, I would like to offer these and then ask the witness questions as to what they represent.

The Court: Is that something he prepared?

Mr. Griswold: Yes. I will offer in evidence these three charts.

The Court: Go ahead.

The Clerk: All as one.

Mr. Griswold: No, we better mark them in order.

The Court: Give them a letter, and mark them 1, 2, 3.

Mr. Griswold: If I could have some thumb-tacks.

The Clerk: J-1, -2 and -3.

(The documents referred to were marked as Defendant's Exhibits J-1, J-2 and J-3 and were received in evidence.) [343]

The Court: I think you will have to move it, you have a better angle the other way. All right. You may stand up, Mr. Braun.

The Witness: I would like to bring out in these charts that one of the important features in any variety is the size of the fruit from the standpoint of the pack-out of the farmer. So I took all these different boxes and different sizes, and found the percentage packed out for the different sizes. Under the "K" column here, we have the Kozuki Sun Grand——

Mr. Savage: You are referring to what one?

(Testimony of Oscar Martin Braun.)

The Witness: This is the exhibit showing—

Mr. Griswold: J-1.

The Witness: —the pack-out sizes 60, 64, 65 to 48. In other words, this is the larger fruit in any nectarine pack out. Now, we find from the Kozuki orchard—and I want to make this statement for the record that all three of these farmers are good farmers, very conservative.

Q. (By Mr. Griswold): They are representative.

A. They are representative. Now, I have 15.91 per cent of the pack-out from Mr. Kozuki made these sizes; from the Tagus ranch 13.9 per cent of the pack-out made those sizes; from the Clinton Hagler ranch 37.20 per cent made those pack-outs, which shows a much larger percentage of the large [344] fruit from the C. L. Hagler Red King planting.

Q. All right, directing your attention now to J-2, Exhibit J-2.

A. The J-2 exhibit, I took the average size fruit, which includes the 70, 75 and down to the large fruit, the real large fruit, 48, and here from the Kozuki Sun Grand planting we have 53.54 per cent of the pack-out was in these sizes; from the Sun Grand at the Tagus ranch we had 58.28 per cent from these sizes; from the C. L. Hagler Red King planting we have 77.5 per cent of the total pack-out in those sizes, which again, I claim, is a significant difference in the size of the fruit, and would enhance the market value of this fruit.

(Testimony of Oscar Martin Braun.)

Q. Now, directing your attention to J-3, just tell us what the chart shows.

A. In J-3, I wanted to bring out the reverse point of view, so this chart shows the small sizes of the fruit, what percentage of the fruit do we find in small sizes, below average. Mr. Kozuki's planting of the Sun Grand we have a percentage of 45.61 per cent of the fruit was below average sizes, 80 to 96. From the Tagus ranch we find 41.71 per cent which was below this average size. From the C. L. Hagler ranch we find only 22.26 per cent of the fruit was of these small sizes. So here again we find a significant smaller percentage of the fruit of the Red King in this small size [345] fruit bracket.

Q. For the record, I think you misread the percentage. A. 22.6 per cent.

Q. And these records was the entire picking of those entire orchards? A. Yes, sir.

Q. Throughout the entire season?

A. Yes, sir.

Q. Of which year? A. 1958.

Mr. Griswold: Just sit down, please.

The Court: What economic or other significance attaches to a comparison of that character?

The Witness: Your Honor, I would—you mean what significance is there beyond an economic significance?

The Court: Yes.

The Witness: We have variations which are in-

(Testimony of Oscar Martin Braun.)

herent in the sizes of the fruit. May I give you several varieties of nectarines which were introduced and never made the grade because the fruit size is small, the Philips nectarine which was developed at Davis, The Fire Glow——

The Court: You don't need to turn to me. You better turn the other way. My eyes show signs of abuse over many years but my hearing is good.

Mr. Griswold: Slow down a bit, Mr. [346] Braun.

The Witness: Fire Glow. Those were good nectarines but they didn't have the size to them, and the consumer buys through his eyes and likes to buy the highly colored large nectarine, and that is an important characteristic which is also a varietal difference characteristic, because we have small nectarines and we have large nectarines.

Q. (By Mr. Griswold): I show you, Mr. Braun, Exhibit G, the Hagler Red King, and also the Exhibit F, the Tagus Sun Grand, and ask you if you are able to approximate the sizes of the two varieties?

A. Well, let's see. I have to do a little thinking here. I think two and a half is about 70. I think that is about what it is. These would be in the 80's I am sure, and I think that these would probably be in the 70's.

Q. So that a 48 is substantially larger than these in Exhibit G? A. Correct.

The Court: Let me ask you this question: As

(Testimony of Oscar Martin Braun.)

they are a deviation of the peach, we assume that people who eat them compare them with peaches, and peaches are a large fruit, but as fruit is sold now in most markets by weight, isn't there an economic disadvantage in having to use more boxes in shipping by having larger fruit?

The Witness: Well, your Honor, the high quality markets, [347] such as the Farmers Market in Hollywood, or any market where you have the above-average trade, prefer to buy, they associate quality with the size of the fruit; now, for a man with a large family it would be more economical for him to buy small size fruit. The quality of the fruit is the same, but the size factor is different. In other words, we can have good small fruit as well as good large fruit. It seems that the average consumer, if he has a choice, will take the larger size.

The Court: Eye appeal?

The Witness: I think you might call it that. Your Honor, I was interested in this point——

Mr. Griswold: Sit down, please. I didn't ask you a question, did I?

The Court: No, no; he wants to make a point. Go ahead. What were you going to say?

The Witness: Well, I was interested in this point strictly from the economic value, because I also have a farm of my own and it has to pay the bills, and you get more money if you are shipping large fruit than you do if you are shipping small nectarines, especially since we have the Nectarine Marketing Agreement, which limits the small sizes,

(Testimony of Oscar Martin Braun.)

and many of these small sizes cannot be shipped, your Honor, because they are too small.

The Court: I see. All right. [348]

Q. (By Mr. Griswold): You are identifying the sizes coming from the Sun Grand. Incidentally, are you doing any plant breeding at the present?

A. You mean—we do with our students at college, they work on special problems with Dr. Weinberger, or did you mean personally?

Q. On your own farm.

A. Yes; I have engaged in plant breeding for a number of years.

Q. And in nectarines? A. Yes.

Q. How long have you been trying to propagate nectarines?

A. Well, I have some crosses that I am waiting to get some F-2 generation from this next season, and I also have some nectarines seeded out, and I have planted thousands of seeds to find out what I could about the possibilities of getting some improved varieties. However, I have—I guess, I just have not found anything to be worth saving so far, at least.

The Court: You haven't developed your experiments? You are in the experimental stage, you haven't produced——

The Witness: I haven't produced.

The Court: ——a tree that would produce fruit that is a deviation? [349]

The Witness: That would be acceptable. I mean,

(Testimony of Oscar Martin Braun.)

we try to have pretty high standards before we put a new variety of fruit on the market.

The Court: All right. This shows my ignorance, does Fresno State have a complete agricultural department?

The Witness: Yes; we do. We have over a thousand acres that we farm, and in our horticulture department we have——

The Court: Do you give a degree——

The Witness: In agriculture.

The Court: ——which is recognized by the University of California?

The Witness: Yes, sir.

The Court: Although you are independent?

The Witness: No; we——

The Court: Are you a part of the system?

The Witness: We are independent, we are not part of the University system as yet.

The Court: You still have your separate board of regents?

The Witness: State Department of Education.

The Court: Yes. Let's see, I think there are only three left, or two, I think you and San Diego State are the only ones, I don't know about San Jose State, the only ones not a part of the University system. But they recognize, if a young man took a degree in agriculture and wanted to get a [350] Master's he would be given full credit for his Bachelor of Science?

The Witness: Yes; we have transfer students

(Testimony of Oscar Martin Braun.)

at Davis and at Berkeley now from Fresno State College, who are engaged in post graduate work.

The Court: I see. All right. I am interested in that. My two children are graduates of the State University. One of them has gone to teaching, but he is a nuclear chemist. I am always interested in the high standards of California schools. All right.

Q. (By Mr. Griswold): I want to show you Defendant's Exhibit A, being plant patent number 1718. As far as coloration, am I not correct the color is likewise a very important part, as far as the customer eye appeal? A. Yes; it is.

Q. And I notice that in your patent, in the Hagler patent, that there is reference to certain plates, that is—is that some standard of the—

A. Yes; in order to agree on colors, the authorities have put out color dictionaries, and I believe I used the color dictionary by Maertz and Paul in comparing the colors which were used.

Mr. Savage: What was the name of that?

The Witness: Maertz and Paul. I believe I have a copy [351] from the library there with me.

Mr. Savage. How do you spell it, please?

The Witness: M-a-e-r-t-z and P-a-u-l.

The Court: I think there is a reference in the defendant's patent.

The Witness: Yes.

Mr. Griswold: Do you have that book in court?

The Witness: Yes; I do have.

Mr. Griswold: I don't want to—

(Testimony of Oscar Martin Braun.)

The Court: No, no; let's not get into that. I may say that counsel and I were at cross purposes today when we were talking about admission, what you had in mind is medical books. What I had in mind is, with medical books the rule is you can't read from books.

Mr. Shepard: I admit, your Honor, that I was thinking of those books.

The Court: Well, you were right. Even with medical books, the rule is—I checked the matter at noon, because in one of these cases I had in front of me the other day, and even a doctor testifying to a medical matter may give his authority, and then may be confronted.

Mr. Shepard: Right.

The Court: However, when it comes to patents, there is greater latitude because the field is so broad, it isn't so narrow as the field of medicine, and a greater latitude [352] is allowed, although I do believe that indiscriminate reading of authorities would be bad practice, and in the case I referred to, it is true that those were given to show the invalidity of the patent, but the expert testified first and merely used that to bolster his opinion, so as a practical proposition I believe for the present I would rather not have anything in the record except the reference, and if you want to check and satisfy yourself you may do it on cross-examination, because this examination is pretty extensive, and I don't want to go into reading of experts at the present time.

(Testimony of Oscar Martin Braun.)

One of the cases I had in front of me the other day, that latest case is *Gluckstein v. Lipsett*. It is a Court of Appeals decision written by, I think, Judge Bray, yes, of the First Division, and he sums up the law on the subject and reviews all the other cases, but he is dealing with medical books, and he says you can't read from medical books, but even a doctor testifying as to medical matters may give his authority, and be cross-examined. Did I give the reference to that, Miss Schulke?

The Reporter: No, you didn't.

The Court: It is 93 Cal. App. 2d 391. Incidentally, as a former Superior Court Judge I always look at the end to see if it has the approval of the Supreme Court, because it is not meaningless like certiorari denied in the Court of [353] Appeals when it merely means that four judges didn't think it was of sufficient importance to bring it up. But when the Supreme Court of California says "hearing denied" then you are absolutely sure that it approves the ruling, and if it approves merely the conclusion without the ruling it says so. So this opinion in the *Gluckstein* case has the approval of the Supreme Court because a hearing was denied with only one judge voting for a hearing. It is a very interesting malpractice case. And the other case, the leading case before that is *Rae v. California Equipment Company*.

In the *Lipsett* case the court allowed the experts to read, or allowed Mr. Belli to read excerpts from

(Testimony of Oscar Martin Braun.)

books to his expert, and while the court held it was error to do it on direct examination they said it was harmless error. But in *Rae v. California Equipment Company*, which is 12 Cal. 2d, an opinion written by the late Judge Langdon, who was my Judge in Stanislaus County many years ago when I practiced there, Judge Langdon did just the opposite. A man was allowed to refer to his sources for his opinion, and that was a medical case too, and then when it came to cross-examination the court didn't allow cross-examination as to the exact wording of the record, and they held it was error.

But, as I say, there are many things that are permitted in a patent case as to various issues which wouldn't be [354] allowed in other cases. For instance, years ago, in cases involving similarity of names, confusion of source, I have allowed polls taken on the street, by being shown, for instance, the Sunbeam lamp and asking the person "what does that convey to you?" I also allowed a poll to be taken by a professor at U.S.C., who submitted a question relating to Sunbeam products to his students. So, as a matter of fact, the practice has become so common since that there is an article in last year's *Harvard Law Review*, "The Pollsters Go to Court." That is a rather frivolous title for the *Harvard Law Review*, but it carries the point.

So I don't think we need to go into those. They are available and if counsel wants to check the reference he may do so. Let's go on now.

(Testimony of Oscar Martin Braun.)

Q. (By Mr. Griswold): Mr. Braun, you are familiar with the Federal-State Market News Service? A. Yes, sir, I am.

Q. As a matter of fact, in your classes you receive all copies of the Federal-State Market News Service?

A. Yes, I do, because I feel it is important for my students to know what the various prices are, what the various varieties bring on the auction market, on the various markets.

Q. For 1957 the United States Department of Agriculture [355] has prepared an auction price summary on nectarines, has it not?

A. Yes, sir, it has.

Q. I will show you a document entitled Federal-State Market News Service, Auction Price Summary, Nectarines, 1957. February, 1958, the date, consisting of some 25 pages, and ask you if that is one of the reports which you received in the normal course from the Federal-State Market News Service?

A. Yes, it is. We receive reports similar to this on plums, apricots, peaches, and other varieties of fruit.

Q. That document there, however, is devoted entirely to nectarines?

A. This report is entirely on nectarines, yes, sir.

Q. And does it have a summary as to the average price received for Sun Grand nectarines in the State of California during the harvest season and marketing season of 1957?

(Testimony of Oscar Martin Braun.)

A. It does, on page 4, table 1, it gives the seasonal weighted average auction prices by varieties.

Q. And does that bulletin also give the average price received on the auction market for a variety marked Red King for the season 1957?

A. Yes, sir, it does.

Q. And where does that appear?

A. Well, that appears on page 4, table 1, and it reads 1957, 2,320 lugs of Red King, which sold for \$4.74 market [356] average.

Q. \$4.78? A. \$4.74.

Q. And what was the average according to that summary for the Sun Grand?

A. Sun Grand, listed below it, 45,731 lugs, 1957, established \$4.18 a lug.

Mr. Shepard: What page are you reading from?

The Witness: Page 4, table 1.

Mr. Griswold: We will offer in evidence the publication of the Federal-State Market News Service.

The Court: I don't think we ought to encumber the record with the entire publication. We can mark it for identification.

Mr. Griswold: Just that one page, your Honor.

The Court: If you only want one page, then I will receive it, unless you can spare it.

The Witness: We have extra copies.

The Court: Then we will just mark that page.

(Testimony of Oscar Martin Braun.)

Mr. Griswold: Page 4, and there is a pencilled line where Sun Grand appears. You put that there, did you not?

The Witness: Yes. Well, I thought that was significant because it shows a higher market return for the Red King, which because of its color and size and eye appeal is desired more by the people in the market. [357]

The Court: Wouldn't it be scarcity and novelty?

The Witness: It could be, there are many factors.

The Court: You had what, 2,300 against 45,000 of the other kind?

The Witness: That is true.

The Court: Don't people always want to buy something new? At least the advertisers think so, the way they blatantly shout everything over the air all the time. All right.

Mr. Griswold: No further questions.

The Court: When I made that statement, don't think I meant to cut you short. I merely am trying to organize our time. Suppose we take our afternoon recess now.

(A short recess was taken.)

(The page of the bulletin referred to was marked as Defendant's Exhibit K, and was received in evidence.)

The Court: All right, Mr. Braun.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: May I ask the privilege of having the color slides again, to cross-examine the witness?

The Court: You designate which you want.

Mr. Shepard: Yes, I will.

The Court: Certainly. Get your assistant. You call the number. You don't want the whole series shown, do you?

Mr. Shepard: No, I would like to ask about some of them, your Honor. [358]

The Court: All right. You designate which they are and we will have them shown. Let's use the smaller one, it seems to give a better light. Move the other one away.

Cross-Examination

By Mr. Shepard:

Q. Now, let me ask some preliminary questions. It is all right, right there, Mr. Braun. Will you tell me how these photographs were taken? Will you describe them?

A. I will have to answer that this way, that the photographs were taken with a 35 millimeter camera in each case, which was on a tripod at a regulated distance. The ones that were close up were taken with artificial light film, and the ones of the fruit which was harvested during the month of July was taken with a daylight film, here again with a tripod, and we used Exakta 35 millimeter camera. Mr. Bates, who took the pictures inside

(Testimony of Oscar Martin Braun.)

used a Practica camera, which was also on a tripod and definitely regulated as to height.

Q. And you took these pictures in a series, where you show a Sun Grand and a Red King, for the flower type, you put them in series. Now, those series were all taken at the same time in each case?

A. As far as I know, yes. When I selected the material, that is, I set it up for him, and all he did was take the [359] pictures.

Q. Would the camera be changed in its position on the tripod as between series?

A. Not that I remember.

Q. And would the focus or the setting of the camera be changed between these pictures you have shown in series here? A. I don't think so.

Q. And you would have observed that in the case where another individual took the picture? You would have observed whether they changed the setting or not?

A. Yes, I think during the series that would be important, because we tried to keep everything controlled as much as we could.

Q. Now, a word about ripeness. Of course, we have not tasted the fruit, but does color indicate ripening to some extent? A. Yes, it does.

Q. If we sliced the fruit in half when it was green, we would see a green colored flesh, or a white colored flesh, what would it be?

A. If you slice green fruit, if the fruit were yellow it would have a lighter color if it were green.

(Testimony of Oscar Martin Braun.)

Q. One more thing, the samples that you took for these pictures, in each case you attempted to take random samples? [360]

A. Right. In other words, you can select anything you want in varieties if you are looking for a specific thing, but the sample would be void, would be useless if I did that. I had to take random samples. That is the way you have to do it.

Q. When you, for instance, were taking a picture of a bud, or ripe fruit, how would you choose those samples?

A. Well, what I did, for instance, when I had them in the large box, I just took what I wanted and that was it. I didn't look at the fruit specifically and say "this is pointed, I will take this one" and "this is round, I will take that one." In other words, I tried to take them just as they came.

Q. You picked them out blind?

A. Well, yes.

Q. And were any of these pictures of fruit, whole fruit, taken out in the field where you picked them right off the tree, or did you pick a box and take them back to photograph?

A. Yes, what I did, on the fruit specimens, since I was working on week ends, and my son, while he was home in July, why, we took those pictures at home. I would pick them on Saturday, and by Sunday we would have all of our pictures. That was the procedure we followed.

Q. May we have picture E-12, and then E-14?

(Testimony of Oscar Martin Braun.)

There was [361] a skip in sequence there. Is that the proper focus now?

Mr. Byrnes: Looking at the print is the best way to tell. That is about as sharp as we can get.

Mr. Shepard: Now, it is pretty hard for me. I have never seen these pictures before.

Q. Would you look at the Red King there, taken just before ripening on June 28th?

A. Right.

Q. And would you note the size? Now, I may turn out to be all wrong, particularly with reference to the ruler there. I think at the time we were showing them on two slides and had E-14 on the other slide, I mean the other screen at the same time. Could I do that just in this one instance?

Mr. Byrnes: Yes.

Q. (By Mr. Shepard): These are random samples of sizes, you picked them blind, as you say, figuratively speaking. Which, in your opinion, is the larger size?

A. Well, apparently from the—in this particular case, number one over here appears to be slightly larger, but I think that this is a variation—it appears to be a variation in the camera distance because this appears more close up than the other one. I don't know, I didn't notice that until now. [362]

Q. Looking at the ruler up there, of course the Judge can see and we can all see, and it is a matter of opinion, but your best estimate from the con-

(Testimony of Oscar Martin Braun.)

trast with the rulers in the pictures, what would you say as to the size of the Sun Grand in E-14 on the left and the Red King in E-12 on the right?

A. Well, let's see. I would say they would both probably be in the 70 sizes, about two——

Q. Well, I am not particularly interested in the box size, as I am in the comparative size. Which is the larger or the smaller, or are they equal?

A. Well, I think they—they look to me as if they are pretty close to equal. Evidently there is a difference there in the shadow and there is a little bit of difference in the blueness in the picture. The same camera was used in both pictures so evidently there must have been a little change there in the height or something, but looking at the rulers, the ruler measurements, it appears that the diameter section up above—well, it's reasonably close. I think it appears that this on the left is slightly larger, which could be possible.

Q. And it would be your declaration now that these pictures which you presented in series were not taken at the same camera position?

A. Well, I didn't take this particular picture for size. [363] I took it for the shape of the fruit, which wouldn't be affected by a little movement up or down. In other words, I was interested in the contour of the fruit here, you remember, and the shape of the fruit, and not the size of the fruit.

Q. Wouldn't it have been more correct and acceptable to keep your camera in exactly the same position and setting?

(Testimony of Oscar Martin Braun.)

A. Yes, but I will tell you what happened. In taking pictures sometimes there is a little jar, or sometimes a little screw on the camera comes loose and it slides down a little and you tighten it up, and sometimes you do affect your stance there, but the intent here is not size, sir, it is the form and shape of the fruit.

Q. But these do happen to be random samples and they should be representative sizes?

A. I think they are. I will go along on that. I think they are representative.

The Court: As you measure them in millimeters and centimeters, an ordinary ruler based upon the inch system wouldn't disclose the slight differences with the other one, would it, which is measured by the metric system, or would it?

Mr. Byrnes: In putting this on the left.

The Witness: No, for the smaller details, of course, the smaller unit of measurement would be more accurate.

The Court: Be more accurate.

The Witness: Yes. [364]

The Court: Go ahead.

Q. (By Mr. Shepard): Did you attempt to measure a range; for instance, did you attempt to measure 50 representative Sun Grand and 50 representative Red King, in millimeters or inches?

A. Well, I took some measurements, I don't think I measured 50 of them.

Q. Well, how many did you measure?

(Testimony of Oscar Martin Braun.)

A. Oh, I don't know offhand.

Q. Do you have any of that data left?

A. I don't have it with me.

Q. You did measure the pits, though, and presented that data? A. Yes.

Q. I take it your measurements of the fruit you didn't consider significant?

A. Well, for an average range of the fruit I didn't think it was a factor which would disclose anything at that time, yes.

The Court: You would almost have to use a very accurately-marked tape to measure circumference and the like?

The Witness: You would almost have to have a caliper, to do that and take the measurements, which I didn't do.

The Court: You would have to have a caliper, that is right. [365]

Q. (By Mr. Shepard): As a matter of fact, your measurements on the patent are in inches, the same as the measurements on the Sun Grand patent? A. Could be. I don't remember.

Q. I think it is on the patent itself. And you have used in your patent a measurement of the transverse and axio measurements in inches?

A. I believe so.

Q. Would you turn to slides E-22 and, I think, E-23?

Mr. Savage: Can you gentlemen hear him when he talks so low? Would it be permissible for our

(Testimony of Oscar Martin Braun.)

experts sit up where they could hear the witness? They are having difficulty.

The Court: I have no objection to them taking a seat in the court enclosure.

Mr. Savage: If you will speak a little louder, I will appreciate it.

The Witness: I will try to, sir.

The Court: Sit in the jury box, sit anywhere you want.

Mr. Byrnes: This is slide E-22 on the screen.

Q. (By Mr. Shepard): Let's take E-23 if we can on the other projector, and you can interchange them if the projector makes a difference. [366]

Mr. Griswold: I think the projector magnifies a little more on the other side.

Q. (By Mr. Shepard): We will interchange the pictures when I get done with my question. Again, these are representative samples?

A. Yes.

Q. And I believe that you were pointing out something else about the shape in these pictures. I think that is the reason you took these pictures, was it? A. Yes.

Q. Now, one of the distinctions you pointed out, as to the Red King, was color, that the Red King, I believe you in simple terms stated it was redder than the Sun Grand. Maybe I am putting words in your mouth. Would you point out to me now the differences in color in this photograph, and interchange the slides, if you like?

(Testimony of Oscar Martin Braun.)

A. Well, from the standpoint of color, I would make this declaration, that the color factor is variable, and I mentioned that, but that on the average Red King fruit is more highly colored than the average Sun Grand fruit. Now, here again, when I was making this selection, this random selection does show, and I think those particular specimens there do have good color, but I think you also notice they have more of an orange color to them and not so much of the reddish color, and here again, of course, the [367] color—I believe when I showed those I attempted to bring out, not the color so much, as the form differences there.

Q. Mr. Braun, the reason I am bringing these slides in is because you didn't put these slides together for the color, but nevertheless, they are representative samples? A. That is right.

The Court: Well, as I gather from the testimony of the witness, he would take certain things for photographic purposes to emphasize certain factors, and then took others to emphasize other features, isn't that true?

The Witness: Yes, sir.

Mr. Shepard: I recognize that, your Honor. Do you have 17 on one side and 16 on the other?

Q. There are 16 samples in one picture of the Red King, and 17 of the Sun Grand, more or less, there. That is about as many as you showed in any picture, isn't it?

A. I think so because—I mean you have to space them to a certain extent.

(Testimony of Oscar Martin Braun.)

Q. I remember four by four which had 16 later on.

A. So I thought that was representative of lots, and of course in those lots I probably had——

Q. Is there any reason why this photograph, although it was taken for the purpose of showing something else, should not be representative as to color?

A. Well, I think that there is a certain variation—— [368]

Q. No.

A. ——in color of the varieties of fruit, which will show a color variation there, so that, I wouldn't accept that as a typical Sun Grand color, however. That shows that way in that variety at that time; I wouldn't call it typical for Sun Grand however.

Q. But you did pick out random samples of Sun Grand? A. Oh, yes, absolutely.

Q. It just happens that in this picture, the last samples you don't think are typical?

A. I wouldn't say so, no. I wouldn't say those are typical of Sun Grand. It was explained to me, sir, by a fruit grower who grows Sun Grand that the typical Sun Grand has a yellowish orange color and not that reddish color.

Mr. Shepard: I move to strike that as hearsay.
The Court: Well, it may be stricken.

Q. (By Mr. Shepard): Now, you showed in the next picture, E-24, if I may have that.

(Testimony of Oscar Martin Braun.)

Mr. Byrnes: I have 22 and 23 here. Do you have 24?

Mr. Shepard: Well, go ahead, interchange those last two.

Mr. Byrnes: That is what I was trying to do.

Q. (By Mr. Shepard): Do you wish to add any comment when the films are interchanged? [369]

A. The only comment I would say is that both those samples are representative samples, picked at that particular time as random samples and the fruit of the Red King showed a more oblique rounded shape than the fruit over here, the Hiraoka Sun Grand does.

Q. May we have E-24 now? Now, what is that, the top or base?

A. Yes, that is the base, showing the base view, or in other words, the fruit is resting on the apex, on its apex.

Q. Did you have any pictures of the Sun Grand in that position?

A. I believe so. I think we did, didn't we?

Q. I didn't see any sequences, is the reason I am asking that question. I wondered if you had any to contrast with Sun Grand.

A. I thought I did. I guess I have some here, but some of these were not shown.

Mr. Byrnes: This doesn't show it fully, but it comes close, E-21.

Mr. Griswold: I suggest you call for the number.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: My cross-examination at this point is whether or not he has a comparable picture. My records don't show.

The Witness: Do you have a comparable? [370]

Mr. Byrnes: No, I don't find any.

The Witness: Except 18, 20 and 21, showing a view, but there is less fruit.

Mr. Shepard: The one we had was on July 5th, and the ones you have were on June 28th. I don't want to belabor the point; maybe later on you can find one.

The Court: Let's go on, time is passing, gentlemen.

Q. (By Mr. Shepard): Now, before I ask you about another picture, did you determine the fertilization program of the Tagus, Hiraoka, Kozuki and Hagler ranches? Do you know what fertilizer they used? A. No, I do not.

Q. Is it true that the fertilizer can make a difference in color, would you say?

A. I think it would, especially if it——

The Court: Speak a little louder so I can hear.

A. Especially if trees are fertilized to excess you would definitely have less of the color, you would have more greenish color, and your coloring would be slower.

Q. (By Mr. Shepard): Did you determine the irrigations of the respective ranches, that is, the time that they irrigated and the amount?

A. No.

(Testimony of Oscar Martin Braun.)

Q. Did you determine the budding practice of the [371] respective ranches, or know of it personally? A. What do you mean?

Q. Well, were these nectarine trees budded—I believe I am not using the right word, thinned is the word I want?

A. Well, I do know this, that the thinning practice on all the ranches seemed to be normal, normal thinning practices for shipping purposes.

Q. You didn't inquire about how they thinned, whether heavy or light?

A. No. I could see that, and I would say that from my experience that—I would say from what I saw that the thinning practices on all these ranches were normal. I mean, I think the farmers were thinning to get a good size and a good crop if they could.

Q. How can you determine that from looking at it?

A. Well, you—some of these things you have to find out from experience, and then some of them, you check the vigor of your trees and you see how far apart your fruits are, which gives you normally an indication. In other words, in practice on peaches, if we want to make sizes with Red Havens, why, we try to thin them out to, say, eight to ten inches between fruit.

Q. That differs on different varieties?

A. Oh, yes.

Q. Are different varieties different, in the heaviness, [372] lightness, or state of bearing?

(Testimony of Oscar Martin Braun.)

A. Yes; they are.

Q. Of number of fruit?

A. Yes; they are.

Q. And would orchards probably vary in degree of number of fruit on, that is from one orchard to another?

A. Yes; different varieties, and then if they have different climatic conditions they could, yes.

Q. And isn't it possible that you might see a tree that you thought was thinned light, and in fact it was just a light bearer?

A. It could be possible.

Q. In other words, it would have been more positive for you to find out personally how they thinned these ranches than your opinion as to the thinning?

A. No; I don't think so. I don't think that would have made any difference.

Q. How about the pruning?

A. As I observed, the pruning practice here again on all these ranches seemed to be what we would call good normal thinning, where they practice a thinning out of the finer brush, and perhaps a cutting back to laterals of the larger brush, which appeared to be a normal practice, as I remember it.

The Court: Let me ask you this question, these were [373] among the ranches which were given to you by Kim Brothers as containing the large number of the various varieties grown?

The Witness: Well, your Honor, I started to

(Testimony of Oscar Martin Braun.)

make a study of the fruit and the flowers, and so forth, on the Kozuki ranch and on the Hiraoka ranch before I received the notice from Mr. Griswold to report to the Tagus ranch to select——

The Court: All right, but these names were given to you by the——

The Witness: No; I called the local packing houses in the Sanger area and asked them if they could tell me.

The Court: Well, all right; from your observation would you consider the ranches—I know Tagus has a reputation all over the country and all over California as being an example of what are called factories in the field, in other words, a large type of production of agricultural products, isn't it?

The Witness: Yes, sir.

The Court: And would you consider from your experience that these three were typical, so far as the growing of this fruit is concerned?

The Witness: Yes; I would.

The Court: All right.

Q. (By Mr. Shepard): The Kozuki and Hiraoka ranches were not given to you [374] by the plaintiff here at all, were they?

A. Oh, no. You see, I was requested, I guess it was in the first part of March, to locate some Sun Grand trees and being in the Sanger area I thought that I would like to find them in that area, so I called these packing houses and asked them if they

(Testimony of Oscar Martin Braun.)

had any farmers who were growing Sun Grands, and then I went to these people and asked them if I could use those trees to make a comparative study.

Q. I think we have that point across. You first went to the Tagus ranch then about April 5th?

A. Yes. That is correct.

Q. And you made a statement at that time, which I may have misunderstood, that you did not go to the Tagus or Hagler ranches until April 5th?

A. That is right.

Q. In your program?

A. That is right. I visited the Hunter tree, and we located the tree at the Tagus ranch and at the Lyle Hagler ranch all on April 5th. I believe that is right.

Q. Well——

A. As I remember, I believe that is the way it was.

Q. Now, may we look at picture E-2? When was this picture taken?

A. Oh, let's see. I guess I will have to retract the statement that I made; that picture was taken, as I remember, [375] I think it was the first Saturday in March, I believe. I have to retract that, I did visit the original Hunter tree and the Red King grafted tree on the Hagler ranch in March. That's right. I beg your pardon, I made a mistake there.

Q. Now, slides—take that one out—E-28, E-29 and E-30 I had some questions about, taken July

(Testimony of Oscar Martin Braun.)

5, 1958, of the Hiraoka Sun Grand, is that correct?

A. Yes.

Q. Now, what is that, 28?

Mr. Byrnes: That is 28.

Mr. Shepard: May we have E-29? That is a Kozuki Sun Grand on the same day?

The Witness: Yes.

Mr. Byrnes: This is 30.

Q. (By Mr. Shepard): 30. What I wanted to get at was, 30, I want you to observe the colors. The upper left-hand fruit at the top, the fruit there appears to be a lighter yellow? You observe the color. Now, will you go back? This is the Sun Grand on the same day at the Tagus ranch, and would you observe the color of the preceding picture? Those yellows are more pronounced, are they not? A. Yes.

Q. And yet they have been taken with the same focus, [376] and everything?

A. So far as I know.

Q. Well, you took the picture, didn't you?

A. I believe that my son, Russell, took those pictures.

Q. Did you observe him take them?

A. Yes; I set them up. I cut the fruit and set them up. So far as I know, everything should have been equal there.

Q. At least that was your instruction?

A. Yes; that's right.

Q. Then the previous picture——

(Testimony of Oscar Martin Braun.)

A. That would indicate, of course, to me a little difference there in the probable maturity at that particular time.

Q. One is the Tagus, the previous one was a slightly lighter color?

A. There are, I think, one or two in there that have the low—that is outside in the sunshine and it may be there was some possible deflection there. I don't know, but it does—it appears—I notice that, that does appear that it would indicate a difference in maturity there, which could be possible too. In selecting samples that way, why, sometimes I would just take a representative lot at a certain time and they wouldn't all be the same maturity.

Q. These were taken to show the pits. Are 31 and 32 the Red Kings of this section? [377]

Mr. Byrnes: Probably would be. This is the other one.

Mr. Shepard: Yes; that was 28, the Hiraoka.

Mr. Byrnes: Would you like 31 and 32?

Mr. Shepard: Yes.

Q. Now, that is the Red King graft on the same day, that would indicate the Hagler principal orchard? A. Yes.

Q. Are the colors about the same in the prior picture of the same day of the Sun Grand; or do you want to put them on the different screen?

A. Well, from the standpoint of the color, I would say that the—I think that's the normal color

(Testimony of Oscar Martin Braun.)

reaction for Red King, as I remember it at that time.

Q. I am asking you for your opinion as to whether the color as between this picture and especially the Hiraoka and Kozuki pictures shown previously are about the same, the flesh?

A. Could I have the other two slides again?

Mr. Byrnes: These are 29 and 30.

Mr. Shepard: Yes. That is Tagus, which I thought was a little lighter.

A. Well, now, this color seems to be a little darker around the pit on several of the fruits on the upper side; then the middle Tagus ranch seem to be a little bit lighter, and the Red King seem to be in between the two really. [378]

Q. Give us the Red King.

A. You notice the deep color there in the pit around that one. This one doesn't seem to be quite so brilliant.

Q. That is off the original tree the same day. Let's show the original a little longer there. That is a little lighter color?

A. Well, it appears that way.

Q. More like the Tagus?

A. Well, it seemed to me it was sort of in between the two.

Q. All right. Now, let me ask you right here whether or not you considered that the ripening period of the Sun Grand and Red King was different?

A. I made a record of those ripening dates, and

(Testimony of Oscar Martin Braun.)

I don't remember offhand what they were. I believe I gave them to Mr. Griswold.

Mr. Shepard: Do you have those, Mr. Griswold?

Q. Aside from the record, your general memory of the Red King does differentiate that from the Sun Grand in ripening date?

A. It seemed to me as I looked over the ripening dates on the dates that they picked the fruit for that pack-out size chart that there was some difference.

Q. Do you recall what it was, whether it was earlier or later? [379]

The Court: Are we talking of early Sun or are we talking about standard?

The Witness: I recall that I asked Mr. Hiraoka, who started picking, I believe, quite early, why he was picking so early, and he made the remark to me it was because he had irrigated and he was afraid if he waited that he would have split pits. I remember that, of Mr. Hiraoka. Now, on these others, I just don't remember, but I have the data.

Q. (By Mr. Shepard): Let me ask you, and when we have the data we will look at that in a minute, because I want you to have all your information: Before you ever commenced this study as you have described in about March 1, 1958, long before that time you had made an opinion, a positive opinion as to the difference in ripening period, had you not?

A. I don't know as to whether I had committed

(Testimony of Oscar Martin Braun.)

myself whether there was a difference in the ripening date between the Sun Grand and the Red King prior to that time. I don't remember. Did I say that?

Q. Let me ask you——

A. I don't remember whether I did or not.

The Court: Well, regardless of whether you said it or not, did you have an opinion? You told us you started out with the idea of making this study and making reports and——

The Witness: I was—— [380]

The Court: ——did you start in with the definite idea from anything you knew before that there was a difference between the accused plant and the patented plant?

The Witness: Your Honor, when I was first made aware of this mutation, it was referred to me as a mutation from the LeGrand, which ripened at a considerably later date, possibly two weeks later, or at least ten days later than the Red King. Then, as I remember now, the subject came up that—I don't know just exactly who mentioned it to me, whether it was Mr. Riesner or Mr. Hagler or who, said that there was some doubt on the part of Mr. Kim here, whether or not this was his variety because he thought it ripened about the same time, and there is, of course, in the ripening—as I remember, they ripened within approximately the same week.

The Court: Then it would be a correct summary

(Testimony of Oscar Martin Braun.)

of your testimony that while you didn't have any opinion of your own, you had been told——

The Witness: Right.

The Court: ——by others that in their opinion——

The Witness: Right.

The Court: ——the accused plant ripened a few days, anywhere from four or five days to a longer date——

The Witness: Within each other.

The Court: ——than the patented plant? [381]

The Witness: Yes; but I don't remember any specific time involved.

The Court: I see.

Q. (By Mr. Shepard): Now, the statement you made, in all due respect to the Court, the statement you made was they ripened within the same week, is that true?

A. It certainly is apparent from the data that I worked on this year.

Q. Now, you helped Mr. Hagler draw up his patent description, didn't you?

A. Yes; I did.

Q. And you were fully aware at the time you started working on this patent description that there was at least admittedly a close comparison between the Sun Grand and his new Red King as he claimed?

A. I don't think I would say that I had that realization, no.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Do you have that patent 1718, I have forgotten the number?

Mr. Savage: Exhibit A, I believe.

Q. (By Mr. Shepard): I refer you to the fourth paragraph in the description or specifications in plant patent 1718, first line: "Although the seed or stone characteristics of the [382] fruit of my new sport are somewhat similar to those of the variety 'Sun Grand' (Plant Patent 974), which sometimes makes it difficult to distinguish the same from each other, it will be amply evident to experts and to others by careful comparison that the stones of my new variety are slightly wider, their pit marks are not as deep and the pit grooves are not as deep. Moreover, the new sport is definitely a freestone type of nectarine, but does not ripen as early as the variety 'Sun Grand,' " and so forth.

Now, you wrote that description, or helped make——

A. I do not think that I wrote that part at all. All that I was asked to do was to write up the description of the fruit.

Q. Well, you stated to Mr. Griswold at almost the outset that you were familiar with this patent?

A. I was familiar with the Sun Grand variety, yes, I had seen it at fairs and judging work, and had seen the fruit.

Q. This is the Red King we are speaking of.

A. Oh.

(Testimony of Oscar Martin Braun.)

Q. When Mr. Griswold put you on the stand he asked you if you were familiar with the Red King patent, and he showed it to you, I think.

A. Oh, Red King, yes.

Q. You are anyhow familiar with it? [383]

A. Yes.

Q. And in the course of your study I take it you read the patent? A. Yes; I have.

Q. Now, I refer you to the last paragraph of the patent on the back page of it in which the claim is set up: "I claim: A new and distinct variety of nectarine tree of the yellow-fleshed freestone fruit type, substantially as herein shown and described, characterized particularly as to the novelty by its habit of ripening about five or six days earlier than the fruit of its parent variety 'LeGrand,' and by a higher red coloring of the skin of its fruit as compared with 'LeGrand.'"

Now, would you say that is an accurate description of this Red King fruit that we are talking about?

A. From my knowledge of the ripening dates of nectarine varieties and peach varieties and plum varieties, I would make the statement that from my knowledge there is a variation from year to year. Now, at the time this information was taken it might have been correct, sir, but whether it would hold this year or next year would depend upon the climatic conditions and it may not be true from year to year, because we do have the variations.

(Testimony of Oscar Martin Braun.)

Q. Now, this is the claim, the novelty as to the ripening period and the color as to the [384] LeGrand.

The Court: I think that is argumentative. He didn't prepare the claim, he isn't bound by it. He merely advised; the lawyer probably prepared it, as lawyers usually do, and I think we are unnecessarily prolonging this examination, because he is not responsible for what is claimed, and it is argumentative. You can argue to the Court that the evidence indicates that the fruit wasn't properly described.

Mr. Shepard: I am sorry, your Honor. I withdraw the question.

Q. May I ask then if you made a study of the ripening period from the statistics available of this Red King, as compared to the LeGrand?

A. As I remember, I believe that I was not concerned with that part of the patent application, that Mr. Hagler determined that himself.

The Court: That isn't the question he is asking. I got him away from the patent, you are bringing him back.

The Witness: Oh, I beg your pardon. What was the question?

The Court: Read it back. He is talking about the experiments you made afterwards as to the ripening period and the conclusion you arrived at on the basis of your own study. You have a chart you have testified from, that is what he is talking about.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Would you read the [385] question?

(Question read.)

A. Yes.

Q. And do you have any charts or figures as to the ripening period for the years in which there are comparable statistics available?

A. No; I haven't made any record, as such. Normally, in that area where the Red King was found, the LeGrands ripen after the fruit has been entirely picked from the mutation tree, so far as I remember it, so that it would be at least ten days or two weeks, difference in ripening date between the Red King and the LeGrand. I do know this, that in different areas you will still have a further spread of time and variance in time, but I would say in that particular area, as I remember it, that was my remembrance in going down to look at the fruit. In other words, after the Red King fruit had been picked off the tree, or fallen to the ground, was just about the time they were starting to pick the LeGrands, which normally would be probably middle of—from the third week in—the middle of July to the third week in July, I don't know; it would vary in that area.

Q. Calendar dates are misleading?

A. They are, yes.

Q. Isn't it a better evidence to compare them with the ripening date of some standard variety, or at least some other known variety? [386]

(Testimony of Oscar Martin Braun.)

A. Yes; it is.

Q. Now, what would your answer be, either on the basis of your study, statistics, or your best opinion, as to the difference between the ripening date of the Red King and the LeGrand?

A. Well, as I remember, as I said before, as I remember the LeGrand would ripen in that area about the third week in July.

The Court: He wants you to get away from the calendar, and give it in point of days.

The Witness: Oh. I would say——

The Court: Give it in point of days. Suppose you had a cold summer, I know you have had some cold summers that delayed the fruit.

The Witness: Yes. Your Honor, the Red King would ripen from 14 to 21 days before the regular LeGrand.

The Court: All right. We finally got it.

Q. (By Mr. Shepard): I will ask the same question about the Sun Grand as compared to the LeGrand, the average difference in days of ripening days, either from charts that you want to refer to, anything that you have in your possession?

A. Well, it is apparent from the notes that I have here on the time of ripening that the Sun Grand ripens all the way either from June 30th, which is—July 7th, [387] which would be—LeGrand ripens the third week in July, that means that you would have a good, oh, approximately three weeks difference between the Sun Grand and

(Testimony of Oscar Martin Braun.)

the LeGrand at this particular season, which, of course, will vary, and we know that varies sometimes as much as two weeks from year to year.

Q. Well, I would like——

A. One way or the other. That is a very variable factor, the ripening dates, very variable.

Q. Now—— A. One of the factors——

Q. ——this is data you got yourself?

A. Yes.

Q. Which shows the ripening periods?

A. One of the things——

Q. May I ask——

A. I believe so, I think that is right.

Q. Would you please verify that?

A. Picking time, yes, this is ripening date indicated by picking time. Now, picking time is influenced by what market you are shipping your fruit to. If you are shipping your fruit to an eastern market you pick it in a greener—you would pick closer to the minimum maturity.

The Court: Well, making allowance for all that, what is your opinion on the basis of such study as you made as [388] to the difference in the ripening time between the LeGrand and the Sun Grand, and the Sun Grand and the accused plant? That is a leading question, and counsel can object.

The Witness: From what I know about the fruit of the LeGrand, I would say that in that area the orchards I have seen and the fruits I have seen, take for instance this year, I think they were pick-

(Testimony of Oscar Martin Braun.)

ing the 19th of July, and as I mentioned previously Mr. Hiraoka started picking his Sun Grands the 30th of June and——

Q. (By Mr. Shepard): Is that what you have on the chart?

A. Yes, sir. And Mr. Hagler started picking his Red Kings July 4th. I mean that is—I think those are——

Q. Well, the Tagus ranch—go ahead, I am sorry to interrupt.

A. Yes; I think those are accurate dates, sir.

Q. You seem to stay away from the Tagus ranch. When did they start picking?

A. They started July 7th.

Q. And that is three days later than Mr. Hagler started, wasn't it? A. Yes.

Mr. Shepard: May we introduce this exhibit in evidence?

The Court: What is it? I haven't seen it. Has it been identified? [389]

Mr. Shepard: It is a copy. I don't know if he has the original.

The Court: All right, it may be received.

Mr. Savage: That will be?

The Clerk: L.

(The document referred to was marked as Defendant's Exhibit L, and was received in evidence.)

(Should be Plaintiff's exhibit.)

(Testimony of Oscar Martin Braun.)

Q. (By Mr. Shepard): Now, if the ripening period here is of importance, Mr. Braun, would it——

The Court: This doesn't indicate the year. Are you talking about this year, is this '58?

The Witness: Yes, sir.

The Court: It may be received as plaintiff's exhibit next in order.

Q. (By Mr. Shepard): If the ripening period is important, would it not be good or better scientific practice to have taken the ranges of ripening period to figure out what the peaks were, rather than just giving arbitrary starting dates and ending dates?

A. Well, I don't know how to answer that question; the earlier fruit brings usually the highest price in some markets, and since—of the largest plantings is made of the LeGrand variety and it competes at a time when we have a [390] heavy shipment of Albertas, the price may be lower, therefore, the people who have nectarines would prefer to pick earlier to get in on the earlier market and make a higher price for their sales. I don't know any other way of answering that question. It varies from year to year, if it happens to be a short Alberta crop and a short LeGrand crop maybe they would delay harvest to get a better price for the later fruit. I mean, it is a variable factor.

Q. I don't want to belabor the point, but I would like to have you answer this question, leaving

(Testimony of Oscar Martin Braun.)

out all these exceptions and changes from year to year, as a general rule would you say from your study, the chart that you have, and everything else, that there is any significant difference in the ripening period of Sun Grand and Red King?

A. I don't know.

Q. All right.

A. I just can't tell you that.

Q. Now, you mentioned something about the glands on the leaves of the Red King and the Sun Grand in your picture sequence there, as to number, and you counted the number and averaged them out?

A. Yes.

Q. Do you remember that offhand, that was what for the Sun Grand?

A. No; I think I mentioned the fact that I counted them [391] on the Red King, and they averaged out 2.25.

Q. Now, did the authorities give any significance to the number of glands?

A. Well, the number of glands are requested by the Patent Office, I believe, for every patent application on nectarines and peaches, and just as the kind of glands, of which there are two, globose or reniform, or if they don't have any, are requested.

Q. How many patent applications have you helped with?

A. This is the first time that I have been asked to write up descriptive notes for a fruit variety.

Q. And your opinion as to what is requested by

(Testimony of Oscar Martin Braun.)

the Patent Office was gathered from whom or how?

A. Well, I understood in talking with someone that that was what they requested. I don't know.

Q. The books that you made reference to, which were in evidence for identification, do they give any significance to the number of glands?

A. Well, they mention—Dr. Gregory mentions in the taxonomic value of glands for purposes of identification that they have some value, but the value is debatable.

Q. The number?

A. I don't remember of reading anything in that publication on number.

Q. However, the type of glands, globose, reniform, [392] or eglandular, are highly significant, are they not?

A. That is questionable, sir. It has been found by Dr. Gregory that Gold Dust peach variety in one state has globose glands and in another state it had—different district it had reniform glands.

Q. And isn't it so significant that he listed a chart of every known peach in his pamphlet in which he lists whether they are globose, reniform or eglandular, or what he calls mixed?

A. He listed examples, I believe, showing the different types and variations at that time. I don't think he listed all varieties, because there are hundreds of varieties of peaches, although he did list many varieties.

Q. Exhibit D for identification, which was in-

(Testimony of Oscar Martin Braun.)

troduced by your counsel, beginning on page 212, and the three or four pages thereafter, do you attach any significance to that table of glands, of dozens and dozens and perhaps hundreds of fruit there?

A. Not anything ordinary to the fact that he makes the statement on page 219 that——

Mr. Savage: What exhibit?

Mr. Shepard: That is D.

A. ——that there is some variation and that these glands have been used, and it is indicated whether they are globose or reniform or do not have any, but there is a [393] variability in these glands in varieties and that they aren't always stable.

The Court: Mr. Braun, I think so long as you are not using the slides now, it would be helpful to everybody if you came back here. If we are going to have slides, why, we will have to finish tomorrow morning.

Q. (By Mr. Shepard): Now, in the work that you made reference to, that you have there in your hand, that was written in 1915 or thereabouts, Gregory?

A. Yes; that is right.

Q. We have made some progress in pomology since that time?

A. I think so.

Q. And the following work written in 1946 gives special significance to glands, does it not?

A. Well, it mentions glands in here as a means of identification, yes.

Q. Yes. And it refers to the reniform, globose

(Testimony of Oscar Martin Braun.)

and eglandular situation? A. Yes.

Q. Now, I would like to change to a different subject, if I may, Mr. Braun. The tree in the Hunter orchard, which has been labeled the discovery tree, you first saw that tree when? [394]

A. Let's see. As I remember it, I think it was in 1955. I think that I was down to see Mr. Riesner, Sr., about some nursery trees planting, and, as I remember, I think he took me over to this tree and mentioned the fact that it looked as if they had a mutation in the LeGrand planting of Mr. Hunter.

Q. And then the following year, '56, some time in '56, Mr. Hagler asked you to start working on these patent descriptions?

A. No. As I remember it, Mr. Riesner, Jr., came to me and asked me if I would write up the description for that variety, and I said I would do it.

Q. Are you familiar with Mr. Riesner having an interest in this Hagler patent?

A. I am not familiar.

Q. But at any rate, you began writing up descriptions in 1956? A. Yes.

Q. So I suppose you observed that tree again?

A. Yes.

Q. Now, did you agree with Mr. Riesner that the fruit on that tree was a mutation?

A. I examined the tree carefully to see if—whether or not I could locate in the trunk a place which would show whether or not it had been grafted, and if it had been [395] grafted where

(Testimony of Oscar Martin Braun.)

they would make the V cut in the trunk, or if they used a cleft graft where they would make the cleft, and where the scions would be inserted in that V notch or cleft, and usually the bark would be different and would show a definite line of demarcation where the growth takes place. I looked for something of that kind. I couldn't find it, from my general knowledge, having grafted trees myself and since I am familiar with the growth of grafts, I was convinced that there was no evidence that I could see which would indicate that it wasn't a mutation.

Q. Did you find any evidence of grafting or budding or top working at all on that tree?

A. Well, there were several things that were mentioned there.

Q. Well, now, I am asking you what you observed?

A. No; as I remember there—it was a limb in the north—on the north side of the tree, I believe, that had a stub there of some kind, whether it had been sawed off previously or cut off, I don't know. Then on the west side of the mutation growth, which had two large limbs, as I remember it, there was a large cut right near the base of that limb, and, as I remember the way the story went, that was cut off by someone.

Q. Is that the one you showed the picture of?

A. Sir? [396]

Q. Is that the one you showed the picture of?

A. That limb was cut off by someone without

(Testimony of Oscar Martin Braun.)

permission from Mr. Hunter. No one seems to know why it was cut off or when exactly.

Q. You showed a slide on the screen and pointed that out, didn't you?

A. Well, the slide that I think I showed on the screen pointed to the fact that there was a lateral branch growing about eight or ten inches from the ground this spring, which had nectarine blossoms on it, and had nectarine fruit on it, and then all of a sudden somebody cut it off.

Q. What kind of fruit was on there?

A. Nectarine fruit.

Q. You don't know whether it was Red Grand or LeGrand?

A. No; I couldn't say, because it was very immature, very small fruit. But this does show, of course, the limbs here, and whether or not—there was no evidence that the limb was cut off but I didn't see any evidence of any grafting.

The Court: Well, you answered that several times. Did you see any evidence of budding?

The Witness: No; I didn't.

The Court: All right. What was the other one?

Mr. Shepard: Top working, which includes budding and grafting, I guess. [397]

The Court: All right.

The Witness: No; to my knowledge I didn't see any evidence of top working.

Q. (By Mr. Shepard): On the whole tree?

A. Right, not that I recognized.

(Testimony of Oscar Martin Braun.)

Q. Now, were there any other varieties on that tree than the accused variety, Red King, in 1955?

A. Well, as I remember it, going to the tree with Mr. Riesner, there were two varieties on that tree.

Q. What was the other one?

A. It was LeGrand and Red King, as I remember it. One was green—the other one, Red King, was ripe, and the other was green, like the fruit was on the adjoining trees which I understand are LeGrand. As I remember it, that is the way it was.

Q. Now, in 1955, would you describe how big, how large those two limbs were, the one we will call LeGrand and the one that later you called Red King?

A. Well, I don't know. Let's see. They were substantially large. I would say, oh, probably four inches in diameter, something like that.

Q. Were they the same size?

A. These two limbs coming out with the mutation?

Q. Well, one—— [398]

A. No; because there were two limbs coming out on this main limb, you see, that has the mutation.

Q. I am talking about the main limb that had the mutations on, and——

A. As I remember——

Q. ——then in contrast to the other limb which had LeGrands on. Were they the same size?

(Testimony of Oscar Martin Braun.)

A. Well, I don't remember, sir. I just don't remember that.

Q. Did those two limbs appear to come from the same starting age on the tree?

A. You are talking about the mutation limb?

Q. I am talking about the mutation limb, whether two or one, where it grew into the tree proper, and where the LeGrand limb went into the trunk proper, did they appear to be at the same starting point in time of age?

A. I just don't know. I can't give you an answer on that because I just don't know. I don't remember.

Q. Was there any evidence of a peach on the tree?

A. I saw no other fruit on the tree at the time.

Q. Now, do you have an opinion from what you know, experiencewise, academically, and what you observed down there, as to whether or not this Red King was in fact and is in fact a bud sport from the LeGrand?

A. Well, from my personal opinion, based on my knowledge [399] of the subject and my experience, I would say that it is possible that that Red King is a mutation separate from the LeGrand. We don't know why mutations happen, we don't know when they are going to happen, and I would, say, from my experience that is quite possible.

Q. Now, then, would you describe what you know of the characteristics of the LeGrand? First off, do you know what kind of glands they have?

(Testimony of Oscar Martin Braun.)

A. Well, now, I don't remember offhand but I think they are reniform, but I am not sure.

Q. That is my understanding. Do you know what type of flowers they have, the LeGrand?

A. I think you would call them large showy flowers.

Q. Do you know whether the LeGrand is clingstone or freestone?

A. I believe that the LeGrand is a clingstone.

Q. And you have already mentioned in your opinion the LeGrand ripening period is considerably later than the Red King?

A. Yes; I am sure that is true, that, as I remember, the fruit on the Red King was completely mature and dropping to the ground at the time the LeGrand was ready to harvest.

Q. And as to the vigor of the LeGrand, would you say that it is less vigorous than the Red King?

A. That is a difficult question to answer. I don't know. [400]

The Court: May I interrupt? You want more time?

Mr. Shepard: I would appreciate more time.

The Court: Then we better recess. We have worked pretty long hours.

Mr. Shepard: May I have permission, your Honor, to examine these films at some convenient time outside of court, the slides, since I never saw them before they were introduced here? Maybe we could come at 8:00 o'clock in the morning.

(Testimony of Oscar Martin Braun.)

The Court: We are all here at that time. Mr. Eiland gets here pretty early.

Mr. Shepard: I suppose I could take them to another room.

The Court: There is an adjoining room, isn't there, the one occupied by the bank examiner?

The Clerk: Yes.

The Court: There is an adjoining room. You can even go and use the second little courtroom here, if you want.

Mr. Shepard: Thank you.

The Court: I think you should have an opportunity to examine there. All right.

(Thereupon at 4:45 o'clock p.m. a recess was taken until 10:00 o'clock a.m., November 7, 1958.) [401]

November 7, 1958—10:00 A.M.

The Court: All right, cause on trial.

Mr. Shepard: Mr. Braun.

OSCAR MARTIN BRAUN

a witness for the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: I think for the record it should be stated the Clerk this morning made available to you the slides.

Mr. Shepard: Yes; that is correct, your Honor.

(Testimony of Oscar Martin Braun.)

However, it is pretty hard to look at these slides in a few minutes, but we have looked at them.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Shepard:

Q. Mr. Braun, you are acquainted with the Federal-State Market News Report?

A. Yes.

Q. As you have previously testified?

A. Yes; I am.

Q. And there was introduced through you a 1957 summary of auction prices for California nectarines, I think it was? A. Yes, sir.

Q. Now, that is based on the daily reports, is it not?

A. That summary is an average price for all sales for [404] that particular variety during that season.

Q. And has to be based on the daily reports?

A. Yes, sir; has to.

Q. There are daily reports from the Federal-State Market News Service during the summer when the fruit is in auction? A. Yes, sir.

Q. And it is true that one variety of fruit will obviously vary in price during the shipping year at the auction point? A. Yes; it will.

Q. Depending on the factors of the market?

A. Yes, sir.

(Testimony of Oscar Martin Braun.)

Q. Now, you gave us the cumulative—or pointed out the total year end averages of prices between the Red King and the Sun Grand. I show you here the Federal-State daily report No. 48, labeled for Thursday, July 18, 1957. You are familiar with that report? I take it you haven't read that particular report there in the last days possibly, but you recognize that as a daily report?

A. Yes, because we were shipping fruit and I look for these regularly during the year for varieties.

Q. And that particular report would be one day of the summer upon which Defendant's Exhibit K, the 1957 summary, was based? [405]

A. No, sir; I can't agree that this summary is based on this information.

Q. Will you explain?

A. Well, this report here, the Federal-State Market News Service, report 48, gives a price on fruit which was sold at different points, in this case, nectarines, at Fresno, California, on a certain day for certain sizes, whereas this report is a summary of all sales made at the auction markets during 1957.

Q. That report I gave you, does that have the prices for sales in Fresno, California, on it?

A. Yes; it does.

Q. Does it have the prices for the sales for the auction markets in the east? There are two or three pages to it.

(Testimony of Oscar Martin Braun.)

A. Yes; it does.

Q. That has the individual lot sales in each town in the east; I should say city, such as Detroit, Philadelphia——

A. Yes; I see some cities listed here, with prices.

Q. And then at the bottom, I don't know which page you have there, but at the bottom of, I think, the third page, second sheet, maybe the fourth page in your set, is a summary of all the fruit sold on that day according to variety? I will point that out to you.

A. Yes; I see that here.

Q. Now, the prices on a particular day would be a [406] better comparison between two given varieties, than the year end average, would it not?

A. I don't think so, sir. There are too many points there that would be important in making the sales, such as the available fruit at that particular market in competition with other fruit, the particular demand at that time, the special trade that was interested in these particular varieties, and I think this information would be more erratic than the yearly average is.

Q. Well, maybe I can read them to you there.

Mr. Griswold: Counsel, do you have all the reports for 1957? I will stipulate you may introduce them.

Mr. Shepard: As far as Red Kings, I think I do.

Q. This report of July 18th shows, as to Red Kings, 385 lugs, with an average price on that date of \$5.50?

A. That's right.

(Testimony of Oscar Martin Braun.)

Q. If I am interpreting this wrong, I want you to correct me.

A. No; that is the average price listed for this particular day.

Q. Yes. Now, on Sun Grands, on the same day, 3,333 lugs, \$5.85 average price?

A. Yes, sir; that is true.

Q. Then above, in the various cities it gives the breakdown by cities, New York in this case, Chicago on Sun [407] Grands, New York on Red Kings?

A. Correct.

Q. And taking them by cities, Red King sold in New York, all sold in New York, 385 lugs for \$5.50 average, or spread between \$5.00 and \$6.25?

A. Yes; that's true. That's true, but, as I said here, you have the different market factors which are a fact. For instance, John Rivers, which is a very poor nectarine on the New York market brought here \$6.40, which is more than any nectarine on that list—

Q. Mr. Braun—

A. —so the factor is very variable, depending on the demand on that particular day in that particular city.

Q. Well, just to go on here. The New York—the Sun Grands on that day averaged \$6.04, a range from \$4.70 to \$7.45?

A. Sun Grands, yes.

Q. Yes, and Chicago had a different price?

A. Yes.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: We would like to introduce this.

The Court: It may be received.

Mr. Shepard: Plaintiff's Exhibit.

(The document referred to was marked as Plaintiff's Exhibit 11, and was received in evidence.)

Mr. Griswold: Was that just one day?

Mr. Shepard: Just one day. [408]

Mr. Griswold: I have no objection if you wish to introduce all the days of the season.

The Court: Well, I have objection unless counsel has something special in mind. I don't think prices are of any great importance.

Mr. Shepard: I do not either, your Honor, but they introduced it and I wanted to have the opportunity to counteract it.

The Court: All right.

Mr. Savage: What exhibit number, please?

The Clerk: M.

Mr. Savage: This is a plaintiff's exhibit; shouldn't it have a number?

The Clerk: Oh, plaintiff's exhibit? It will be 12.

Q. (By Mr. Shepard): This is July 22nd, similar daily report, No. 50. It shows the comparative prices between Red Kings and Sun Grands as they sold in the eastern markets?

A. Red King at Pittsburgh, \$4.80; Sun Grand at Chicago, \$3.90.

Q. That was 40 crates?

A. 40 crates; Cleveland, \$6.11; at New York,

(Testimony of Oscar Martin Braun.)

1035 boxes at \$2.85; at Chicago, 398 lugs at \$5.34; Detroit, 886 lugs at \$6.19; New York, 1285 lugs at \$5.48; St. Louis, 72 lugs at \$6.22. [409]

Q. Yes, and then the daily average for Sun Grand lugs as against Red King lugs?

A. The daily average, page 4 of this market report No. 50, Red King, 580 lugs, price range, \$4.00 to \$5.00, average price \$4.80; accumulated total packages, 965, and the average price was \$5.08. Now, for Sun Grand, 2641 lugs, price range \$3.95 to \$6.60, with an average price of \$5.72, and a cumulative total number of packages to date of 10,701 lugs, with an average price of \$6.04.

Mr. Shepard: I would like to introduce this, your Honor.

The Court: It may be received. I wish you would explain to me that term "cumulative packages." It is novel to me.

The Witness: Your Honor, that refers to the total number of boxes which have arrived on the market for that season up to that date, from the beginning of the shipping season.

The Court: Oh, I see. All right.

Q. (By Mr. Shepard): Just one more for illustration, is report—

A. Report, deciduous fruit report, No. 53, Sacramento.

Q. And the date is?

A. The date is 7-25-57.

Q. This is daily, too, isn't it?

(Testimony of Oscar Martin Braun.)

A. This is—yes, this is daily, Thursday, July 25th, 1957, report No. 53. [410]

Q. And we can go into detail, but reading it, getting down to the daily averages, against it appears that the Sun Grand had a substantially higher average daily price——

A. However, it does indicate here that——

Q. ——is that true?

A. ——the size, if anything, was larger than the size of the Sun Grand on this particular market. The Red King is 247 lugs, sizes 64 to 84; the Sun Grand, size 60 to 108, and the other 411 lugs, Detroit, size 60 to 96.

Q. Now, that doesn't necessarily show from those limited statistics that the Red King was larger than the Sun Grand, does it?

A. Well, it shows that the fruit in this shipment was larger than the fruit in the other shipment. The range was in a—more narrow range of size of fruit.

Q. As a matter of fact, the range of the Sun Grand showed larger fruit in the extremes of its range than the extreme of the Red King range, didn't it?

A. By four. However, on the other side was 84 against 108. 108 which would be probably—in fact, I don't know how that ever got by the Nectarine Marketing Board, because 96—88 is the minimum size. Both of these are below minimum size. This is '57. We didn't have any marketing board then, but those would be below the '58 size requirement.

(Testimony of Oscar Martin Braun.)

Q. But anyway, in order to make an accurate statement [411] as to sizes, it would have been better to know the number of lots of one particular size, as you showed on your graph?

A. Correct. I figured it out on a percentage basis.

Mr. Shepard: Now, I would like to have this introduced.

The Clerk: That will be 14.

(The document referred to was marked as Plaintiff's Exhibit 14, and was received in evidence.)

The Court: It may be received.

Q. (By Mr. Shepard): Now, referring for a moment back to your charts on sizes, do you have the data for those charts?

A. Yes, sir; I do have.

Q. May I see them, please?

A. I do not have them, but Mr. Griswold has them, I believe.

Q. You had the lot sizes for C. L. Hagler?

A. I had original copies of the data, sir.

Mr. Griswold: I don't know what these are. I will ask the witness. Are these your notes?

A. This is one from Barr Packing Company. Yes; these are the notes that I used as the basis for that.

Q. (By Mr. Shepard): Now, the first thing I call your attention to——

A. Yes.

Q. I will give them all to you here. Referring

(Testimony of Oscar Martin Braun.)

to the [412] C. L. Hagler data, he had a total of 1,029 lugs? A. Yes.

Q. And the Tagus ranch, which you compared with them, had a total of—he hasn't got them totaled there.

A. He has the weight recorded here, but he said—yes, he has them here. I should add this up, I guess; 2,208 this adds up to.

Q. Now, let's see your chart. You chose to make a breaking point in your charts at 75, didn't you?

A. It depended on the different sizes I had in mind.

Q. Exhibit J-2.

A. What I had in mind was to take the average size which is accepted as normally around 70 as an average size fruit, and go from there either way. I believe that is what I did.

Q. Well, I take it your answer is yes to my question, you chose to take 75 as a breaking point?

A. Well, on one of the charts I did.

Q. And to further explain the chart, the J-2—this confused me but I finally figured it out—J-2 includes all the lots which are in J-1?

A. Yes; it does.

Q. So that you got——

A. In other words, I have a more normal crop relation which extends over a wider range of fruit for a certain size. [413]

Q. Now, if you had happened to take 80 as a breaking point, five points difference——

(Testimony of Oscar Martin Braun.)

A. I haven't figured that out.

Q. I know you haven't, but I want you to look at the data on the Tagus ranch.

A. The data on the Tagus ranch shows 965 boxes which peak at 70, and 790 boxes which peak at 80, so you have——

Q. Tagus is the black line marked T on J-2, is that right? A. Yes.

Q. And if you had picked 80 instead of 75, where would that black line go to?

A. If I had what?

Q. If you had picked 80 instead of 75, where would that black line go to?

A. I couldn't tell you that.

Q. Well, you can give me a rough approximation.

A. I don't know. These are figured on a percentage basis, and I would have to refigure the percentage there.

Q. Well, it is obvious that 790 more lugs included in the 80 range, in a total of 2,200, that you would have had a greatly increased percentage, if you had taken 80 as the breaking point?

A. Well, normally in our shipping work we think of average size, below average size and above average size, [414] and that was what I had in mind here, breaking it down into the three categories. If I would have included 80, then I have included fruit which would have been below normal size, you see.

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Would you read the question?

(Question read.)

A. Yes; it would have increased the percentage.

Q. And as to the data on the C. L. Hagler ranch, if you had included 80, which shows 196 more lugs, out of a total of 1,029, the percentage would not nearly have increased as much, would it?

A. Well, there would be a difference in percentage there.

Q. There would be, I grant you that.

A. There would be a difference in percentage.

Q. But the point is, 196 or 200, as to the total of 1,000, is hardly as great as 800 is to 2,000?

The Court: Well, that is a mathematical problem. One is one-fifth.

The Witness: Eight to 2,000 is greater than—well, let's see, than two to 1,000.

Q. (By Mr. Shepard): That is what I am pointing out, 200 is a fifth of 1,000 and 800 is about three-fifths.

The Court: 800 to 1,000 is almost 40 per [415] cent.

Mr. Shepard: That is right.

The Witness: How is 800 involved?

Q. (By Mr. Shepard): 790, I took 800 as a round figure, and I took 200 as a round figure for 196.

A. The Hagler ranch there is no packout as 790.

The Court: Well, let's go on, gentlemen, we are

(Testimony of Oscar Martin Braun.)

spending time on mathematical problems, which are more a matter of argument than a matter of proof.

Q. (By Mr. Shepard): Mr. Braun, you can do different things with the same set of figures, can't you?

A. Well, yes, of course, it depends on what you have in mind, and I was thinking of the three different sizes of fruit, as I said before, the large ones and the small.

Q. All right. Now, one more thing, do you have the pack out sizes on the Lyle Hagler ranch? Your counsel didn't give them to you.

A. Pack out sizes. No; I do not have them.

Mr. Shepard: I would like this data introduced, at least for identification, so my witnesses could speak from it, the three pack out sizes he used for his graph.

The Court: All right, for identification. One number, or separate numbers?

Mr. Shepard: Just one number is [416] sufficient.

The Clerk: That will be 15.

(The documents referred to were marked as Plaintiff's Exhibit 15, for identification.)

Q. (By Mr. Shepard): Did you attempt to get the pack out sizes from the Lyle Hagler ranch?

A. No.

Q. And all of your comparisons in the photographs and the sizes in the photographs were from the Lyle Hagler as opposed to the Tagus ranch?

A. Yes; they were.

(Testimony of Oscar Martin Braun.)

Q. And you have no photographic comparisons, or took no other comparisons from the C. L. Hagler ranch, other than these pack out sizes?

A. No; I did not.

Q. Are you acquainted with this book? I won't attempt to pronounce it. You can spell it, Miss Reporter, the title. *Monographio des Principales Varietes de Pechero*.

The Court: I will help you.

Mr. Shepard: Would you pronounce it, sir?

The Court: I read French. *Monographio des Principales Varietes de Pechero*, by H. Caillavet and J. Souty, published by Centre de Recherches, Agronomiques du Sud-Quest, Mis en Vente Par, LeMaison Rutique, Librairie de L'Academic de L'Agriculture, means the Library, edited and published by [417] the Societe Bordelaise, Bordeaux Society, Bordeaux 1950, and this is published under the auspices of the French Republic, Minister of Agriculture, the institute for agronomical research. Do you know French?

The Witness: I had two years.

The Court: That isn't enough.

The Witness: I don't think I know enough to read that.

Q. (By Mr. Shepard): I am just asking you one simple question, which is whether or not you are acquainted with that book?

A. No; I am not.

Q. Therefore, you would say you haven't

(Testimony of Oscar Martin Braun.)

studied the variety classifications systems of that book?

A. No; I have not by this particular author.

The Court: All right. Do you want to identify it?

Mr. Shepard: No, sir; just cross-examination.

The Court: All right. Is there an international standard in peaches?

The Witness: Well, we have many systematic promologists throughout the world, your Honor, who have been working on the classification of fruits and peaches and nectarines and plums, and evidently I haven't read everything either, and I admit that, and this is one book I haven't.

The Court: Do they have standards just as they have on pharmacopeia, standards of [418] drugs?

The Witness: Well, there seems to be some differences of opinion as to one universal interpretation, however.

The Court: All right.

Q. (By Mr. Shepard): Now, you stated that Mr. Riesner first asked you to work on the description for this Red King patent in 1955, if I recall?

A. In 1956, I believe, sir, he asked me to write up the description for that fruit, and he brought the fruit to me. I first saw the fruit, as I recollect, in 1955, I believe.

Q. And who showed it to you then?

A. I believe that Mr. Riesner took me out to see the tree and showed me the fruit.

(Testimony of Oscar Martin Braun.)

Q. I see. A. Riesner, Sr.

Q. And what connection does Mr. Riesner have with this fruit, if you know?

A. I do not know of any connection, sir.

Q. Has he been your principal consultant when you were making the patent description?

A. I had no consultation with Mr. Riesner regarding the notes that I had prepared.

The Court: His occupation has not been stated for the record.

The Witness: Mr. Riesner is a nurseryman who grows [419] fruit in the Visalia area.

The Court: I see.

Q. (By Mr. Shepard): When did you first see Mr. Lyle Hagler?

A. As I remember it was in 1956, some time, but I am not sure.

Q. Did he speak to you about the patent? Or in what connection did you meet him?

A. Well, as I remember I met him in connection with looking at the fruit on the tree that he was interested in. Mr. Riesner came to me and asked me if I would write up the descriptive notes on the fruit. Mr. Hagler didn't ask me, Mr. Riesner asked me.

Q. And who did you give that description to?

A. Mr. Riesner.

Q. I would like to ask you a few more questions about these pictures. Will you give me a little help, Mr. Taylor? Pictures E-53, E-54 and E-55,

(Testimony of Oscar Martin Braun.)

if you would like to look at your notes on these slides before we put them in. Just run them in any sequence, Mr. Taylor. (Mr. Taylor runs slides.)

I have these in my notes, and I may be wrong, Mr. Braun, that these were given in a series to show the color of the Red King as being redder. Is that what that series is for?

A. Could I see these again, sir? [420]

Q. Yes.

A. It is my opinion that I was interested there more in the pointed apex of the fruit than I was in the color.

Q. These were taken on July 20th, and you noted in the first one, E-53, that is the one we have here now, Sun Grand at Hiraoka, that is when you started to talk about the irrigating and him wanting to pick earlier and make some explanation, I don't know whether it was relevant.

A. This fruit was picked, if the picture was taken 7-20, the fruit was picked the preceding Saturday, which would be the 19th, I think. Let's see. The 19th, fruit that I had picked on the same day from all orchards. In other words, I had to do this on week ends in order to get it in, and I would take pictures on Saturday after returning from the trip on Sunday.

Q. The thing you emphasized and I suppose that I emphasized in my first question, and I suppose you will agree, is that these pictures which you ran in a series were taken under identical

(Testimony of Oscar Martin Braun.)

photographic conditions so as to give a valid comparison?

A. Well, we took them—I put a cardboard on the sidewalk in my back yard and we had the camera on a tripod and we took them all right there in that location.

Q. Show the Red King there, will you? I want to check the record there later. Didn't you say in showing [421] this picture that this showed the increased reddish color of the Red King, and this is slide E-54?

A. Let's see. Now, may I look at the other slide?

Q. That is E-53, and we can show 54.

A. I would say—I don't remember making that statement, but I would say looking at those pictures now, at this time, that there is definitely a less bronze color in the Red King, and more red color in the Red King, than there in the Hiraoka Sun Grand. Yes, sir; I would make that statement.

Q. Look at the background of that picture that we have there, hold it in your mind. A. Yes.

Q. Look at the next picture, E-54, the Sun Grand—no, those are Red King. Look at the background of this picture. Isn't it obvious there is a difference in— A. Yes.

Q. —background and exposure there?

A. Yes; it looks that way.

Q. And the next picture in the series, E-55, contrast that with this Red King picture. This is Sun Grand, Kozuki, taken on the same day. This also

(Testimony of Oscar Martin Braun.)

has a different background than the Red King fruit?

A. Well, now, as I said before, I believe it was my intention here to bring out the differences in the shape of [422] the fruit, and not the color, and it is possible that when Russell was taking the pictures, or if I took them, that there might have been some adjustment of the camera, or looking through to see if it was in focus. It is possible that that might have happened, but these pictures, I believe I presented to show the differences in the shape of the fruit and not the color.

Q. All right. Let me have the slides out of the camera there, all three of them. Just look at these slides with the naked eye, the two Sun Grand slides compared with the Red King. They are obviously different exposures, aren't they?

A. Well, it appears that way, yes. I think the film was also processed by a different company from the appearance of the slide. However, the processing by a different company wouldn't make any difference, I don't believe.

Q. It is obvious that they have different backgrounds, two of them are kind of blue, and one of them is kind of white.

A. Well, there again, sir, the processing might have been responsible for that. I don't know, sir. But there is a difference in the reaction on the screen.

Q. Now, E-41 and E-42, we will get them in a

(Testimony of Oscar Martin Braun.)

minute, as soon as we get these back in order. I think we were showing these this morning when you came in, and I probably [423] made a remark that made you observe the differences in these pictures, E-41 and E-42. 41 is the Tagus Sun Grand, on the screen now, and if you will flip 42 which is the Red King, let's see if they were taken on the same day?

A. No; they were taken on different days. One was taken on Sunday and one taken on Saturday. This was given, as I remember, probably close to around 4:00 o'clock or so, 4:30 and I probably decided—I was taking notes and taking pictures, and if I didn't finish, why, then I continued the next day, and I think that is what happened here. This Tagus picture was taken 7-12, and the other picture was taken Sunday morning, or Sunday afternoon, I don't know, I would have to check, or consult the shadows.

Q. They were taken on different days at different hours out in the sunlight? A. Yes.

Q. So they aren't good comparisons, are they, as to color?

A. Well, let's see. May I see the other? I think here again, if I may remind you, I don't think I was interested in color here. I think I was interested in the shape of the fruit.

Q. My question was, are they good comparisons as to color, being taken on different days and at different hours?

(Testimony of Oscar Martin Braun.)

A. No; I don't think they are, no, they are not. [424]

The Court: I want to make an observation that might save time. I believe, regardless of the purpose for which particular pictures were taken, the Court in determining the question of similarity, will be governed, insofar as the pictures are concerned, by the entire pictures, what they represent. So long as we are using French, there is a phrase used in design patents that might be brought in here, what they call the *tout ensemble*, so I think we are taking too much time emphasizing that certain pictures were taken for a certain purpose, to show similarity of color or not so great a difference as the witness' oral testimony would indicate. I am merely making this observation in the interest of gaining time. It is arguable on the entire record of what, if any, similarity they show, and dissimilarity.

Mr. Shepard: All right. Just one or two more. E-43 and E-54. Which one is this?

Mr. Taylor: 43.

Q. (By Mr. Shepard): Again this was taken on July 12th, which——

A. I believe it was taken July 13th.

Q. July 13th, I beg your pardon. And you didn't take the dates of picking, or you don't have dates of picking by Mr. Hagler, do you, among your notes?

The Court: Of this particular fruit?

(Testimony of Oscar Martin Braun.)

Mr. Shepard: Well, for his Red King fruit you were [425] discussing.

A. On the tree that I had reserved I asked him not to strip the tree, because I had to have some samples.

Q. Well, that tree was a random tree in the middle of his orchard, wasn't it? A. Right.

Q. The point I am making is that July 13th was the middle, possibly even a little late in his harvest picking season. He picked, according to his testimony, July 2nd, 913 lugs—you correct me if I misread it, counsel—July 5th, 1,145 lugs; July 8th, 1,237 lugs; 13th, 660 lugs, and the 19th, 259. This is in 1958, the year you took these pictures. Now, that doesn't disagree with your memory as to the way he was picking, does it?

A. No; I think that is correct.

Q. The point that I want to make is that this picture was taken in the middle, or even possibly a little later than the middle, of his picking harvest?

A. Yes; that's true.

Q. Now, you will note the color there. Now, will you show the other picture I asked for, 54, which was taken on July 20th, according to its label, a day after the last day of his picking, and again, it's my memory that you showed this picture for the heightened red color of the fruit, or pointed that out? [426]

The Court: Well, you haven't put a question to the witness. You made a statement.

(Testimony of Oscar Martin Braun.)

Q. (By Mr. Shepard): Did you show this picture for the heightened red color, or make a comment about the color in making a contrast with, I believe, the Sun Grand?

A. Sir, I believe I mentioned before—his Honor has informed me not to say that, but I didn't take that picture, I believe, for the color; I took it for the shape of the fruit, to show the apex tip of the fruit and the roundness of the fruit as compared to the other variety. That is what I had in mind, I believe, although the color in this fruit does seem darker and more typical of tree ripe fruit, and the same may have been a different sample, there again taking a random sample, you will get some variation in color response.

Q. Did you show any pictures to show the color of the fruit? A. I don't believe I have.

Q. For that purpose?

A. We had the fruit in evidence in court, it was available to see the difference of tree ripe fruit.

Q. It would be your answer then, to the best of your memory, that you made no particular emphasis in your pictures on color? [427]

Mr. Griswold: If the Court please, he has answered, he said he brought the fruit for that purpose.

Mr. Shepard: That is not an answer to my question. That is changing the subject matter.

A. I think it is evident, sir, in looking at the fruit you can see a noticeable difference in color.

(Testimony of Oscar Martin Braun.)

Q. Let's just have one more try at answering this question: Did you take any pictures for the particular purpose of showing color?

The Court: That are in this group. You may have others that you didn't show.

Q. (By Mr. Shepard): Or any others?

A. Specifically I would say that all the pictures taken will show a certain amount of color as the fruit season progressed, that is all I can say. Outside of that, I didn't take any specific just for color. I did—I believe I did take two or three, but I don't have them here.

Q. Would you like to show them?

A. Well, we sent them away to get enlargements but they haven't come back yet. I mean—so I couldn't present them.

Q. Well, this picture, for instance, the primary purpose is something other than color, to show the pit, or something or other? [428]

The Court: He has answered that a half a dozen times. You don't need to answer that.

Mr. Shepard: That is all the questions I have.

The Court: Any redirect?

Mr. Griswold: I would like to exhibit the correspondence here so the witness can mark. I believe that time of ripening was only for the crop of 1958. I would like to ask the witness.

The Clerk: Defendant's L?

Mr. Griswold: Yes.

(Testimony of Oscar Martin Braun.)

Redirect Examination

By Mr. Griswold:

Q. I show you Defendant's L, which is your record on time of ripening, and ask which season that covers?

A. This record is the time of ripening based on picking time, and covers the season for 1958.

Q. And that is the only study that you made about time of ripening? A. Yes, sir.

The Court: That was obvious from his answer given yesterday.

Mr. Griswold: Is it permissible to mark this 1958 season?

The Court: No, it isn't necessary; he has testified what it is.

Mr. Griswold: It doesn't show the year. [429]

The Court: I'll remember.

Mr. Griswold: It doesn't show the year is the only thing.

The Court: I asked that very question, in order to determine. He said it was '58. I have no objection to having the year appear.

Mr. Shepard: Stipulate you can write '58 on there.

The Court: If you want him to add the year, he may. I didn't want anybody else to do it.

Mr. Griswold: Counsel has questioned—

The Court: You want to add 1958 season, all right.

Q. (By Mr. Griswold): Counsel has questioned you at length about the coloration.

(Testimony of Oscar Martin Braun.)

A. Beg your pardon?

Q. Now, you have identified the Exhibits H and G being the Red King, and Exhibit F being the Tagus ranch Sun Grand, and what was the specific purpose of preserving that fruit, Mr. Braun?

A. To see the fruit in its natural color.

Q. And in other words——

A. To get away from the problem of color photography, which isn't quite perfect, and it gives you a chance to look at the fruit as it actually is. That is why I was very anxious to preserve the fruit, sir.

Q. Again, will you state the date on which you picked [430] all this fruit?

The Court: I will sustain the objection. He has already given that, and it isn't necessary. He isn't a woman and he doesn't have to have the last word. This was gone into yesterday. It is not redirect examination.

Mr. Griswold: I have no further questions.

The Court: All right.

Mr. Shepard: No questions.

The Court: All right, step down.

Mr. Griswold: Mr. Hunter.

The Court: We will take a short recess before you call the next witness.

(A short recess was taken.)

Mr. Griswold: Mr. Hunter, come forward and be sworn.

JOSEPH E. HUNTER,

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Joseph E. Hunter.

Direct Examination

By Mr. Griswold:

Q. Your address, Mr. Hunter?

A. Route 4, Box 443, Visalia.

Q. You are the owner of a nectarine orchard?

A. I and my brother own the orchard, yes. [431]

Q. And that is on what road in Tulare County?

A. 68, I believe.

Q. That is the orchard in which the so-called discovery tree is located? A. Yes.

Q. And what is the variety of that orchard?

A. Le Grands, regular.

Q. Directing your attention to that particular tree which we have heard about in this trial, when did you know or did you become conscious of that tree as a specific tree?

A. Well, Mr. Hagler come down one day and took me out there and showed me that tree that had these red nectarines. That was the first time I noticed them.

Mr. Griswold: No further questions.

The Court: Well, do you remember the date?

The Witness: Well, it was in '54. I don't remember, outside of that I don't remember the date.

(Testimony of Joseph E. Hunter.)

The Court: Was anything ever done to the tree?

The Witness: No.

The Court: Still there?

The Witness: Still there.

The Court: All right. Any cross?

Cross Examination

By Mr. Shepard:

Q. Mr. Hunter, the same year that Mr. Hagler showed that [432] tree to you, did Mr. Harry Kim and Mr. Frederic Anderson come out to see that tree later on?

A. I seen Mr. Kim and Mr. Stafford, I believe it was. I didn't know Mr. Anderson, but since now I know he was there.

Q. He might have been along, but you didn't know him? A. I didn't know him.

Q. But you are not saying that he wasn't there?

A. I am not saying he wasn't there.

Q. Yes. Now, at that time, Mr. Hunter, you had a conversation with Mr. Anderson and Mr. Kim, when they came out to look at the tree?

A. No, I didn't.

Q. Didn't you tell Mr. Anderson and Mr. Kim how this variety of nectarine got on that tree?

A. I did not.

Q. As a matter of fact, didn't you tell them that Mr. Riesner had been grafting on that tree?

A. I did not. I didn't talk to them even.

Q. Did you have any conversation with them at all?

(Testimony of Joseph E. Hunter.)

A. The only one I talked—that talked to me was Mr. Stafford, and he didn't talk about this tree. He just walked around through the trees and he mentioned that he thought our trees needed zinc, I remember that.

Q. I am referring directly to Mr. Anderson and Mr. Kim, sitting there and I am pointing to them; you did not have a [433] conversation with these two men? A. I did not.

Q. Had Mr. Riesner been using part of your ranch for nursery work at that time?

A. Not that—he got—not in '54, no.

Q. When did Mr. Riesner take up part of your ranch for his nursery work?

A. That was in '56.

Q. Did you know Mr. Riesner at all before 1956? A. No.

Q. Did he ever come and speak to you before 1956 about this tree? A. No.

Mr. Shepard: That is all the questions we have.

The Court: All right.

Redirect Examination

By Mr. Griswold:

Q. When did you first meet Mr. Riesner?

A. Well, it was—he come over to see about that land, whether it was before that winter or early in '56, I don't remember that part of it. He come over to speak about getting—asked if he could use part of the land for '56.

(Testimony of Joseph E. Hunter.)

Q. That is the first time you met him?

A. Yes.

Mr. Griswold: No questions. [434]

The Court: All right. Step down.

Mr. Griswold: I would like to offer in evidence two pages of a manual of examination and procedure relative plant patent——

The Court: I beg pardon?

Mr. Griswold: Relative plant patent, the procedures in the patent office.

The Court: What is the object?

Mr. Griswold: To set out on plant patents, the United States Department of Agriculture, copies go to them for their approval on any plant patent, as far as the sufficiency as to the variety, that is the purpose. I don't know whether that is in the local——

Mr. Shepard: We object to this, your Honor, as being incompetent, irrelevant and immaterial. We object to it on the further ground that it is apparently an attempt to strengthen their patent, and again I point out to your Honor that they never pleaded or gave us any information about that patent other than a verbal note on the phone prior to this trial, and therefore we had no possibility of setting up some 22 defenses to that patent which are allowed by law, or applying to the Patent Office for all the proceedings and so forth on that patent; whereas, on the other hand, our patent was pleaded from the beginning, they had every oppor-

tunity to go into the manner in which our patent was [435] obtained.

Mr. Griswold: If the Court please——

The Court: I have already stated and I have ruled in the matter, and that provision requiring pleading is subject to the control of the Court, and there is no evidence here that the plaintiff was in any way harmed by the introduction of this patent, the existence of which they knew of, and ultimately, patent or no patent, the question for this Court to decide is whether this is the result of graft of a fruit which is patented by the plaintiff or is the result of a mutation to which the plaintiff cannot claim ownership.

I will sustain the objection, but purely on the ground that the procedure in the Patent Office is not material because the presumption of law is that the patent is a valid patent from the issuance of it, and the manner in which they go about it is not material, and the file of a patent may be received at times in order to show what was in the Patent Office, but the written procedure is not a part of the file in each case. So I am sustaining not on the ground advanced by counsel, but on the ground it is not material.

Mr. Griswold: If the Court please, at this time the defendants rest their case, but ask permission of the Court to have a place for the photographer, certain exhibits of the fruit, and ask that those pictures be taken under the [436] supervision of the clerk and the Court, and then later submitted to the Court. We have the photographer available.

We understand it will take a few moments to take several shots of all the fruit at the same time and under the same conditions, because that is the only practical way.

The Court: Has he got a color camera?

Mr. Griswold: Yes, he has a color camera.

The Court: I think in view of the fact the fruit is perishable I have no objection.

Mr. Shepard: Your Honor, I do have an objection on this ground, that the fruit they have taken here is only two or three fruit at the most, they brought in for the Court to see a whole box; they had an opportunity to make color photos previously. The fruit now——

The Court: Well, I will have them bring back the boxes if you want them, and photograph the entire box.

Mr. Shepard: That would be better.

The Court: Well, we will do it both ways. We have these taken, and then bring back the boxes, if you haven't destroyed them, and we will take pictures of the whole box. So you see, it will go double.

Mr. Griswold: We will do that.

The Court: Then let's go on and take these, and each photo is to be attached to the sack which he photographs, and later you have him—not here, I don't want to take the [437] time of the court.

Mr. Griswold: We will do it then at recess time.

The Court: No, no, take these pictures now. Where are the boxes?

Mr. Griswold: Mr. Braun, do you have those in the icebox?

Mr. Braun: In cold storage.

The Court: Well, then, those you can take in cold storage.

Mr. Shepard: Can those be brought in?

The Court: I don't want to take time doing that. I don't want to take time. I trust the photographer.

Mr. Shepard: I am just asking, for my courtesy, if I can look at them.

The Court: Bring them back. We have reached a bad state in this case, feelings have entered into it, I tried to keep out. Patents are not the subject of feelings, they are questions of money, and when there is money there shouldn't be any feeling at all. Bring them back and have the photographer back this afternoon, but take these three pictures now.

Mr. Griswold: For the record, the photographer should state his name and address.

The Court: Well, he can be sworn. We have sworn photographers just as we have sworn doctors.

Mr. Griswold: Raise your right hand.

The Court: Swear him as a witness. [438]

WILLARD FRED TIDYMAN,
a witness for defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Willard Fred Tidyman.

The Court: How do you spell your last name?

The Witness: T-i-d-y-m-a-n.

(Testimony of Willard Fred Tidyman.)

The Court: All right. Tell us how long you have been a photographer.

The Witness: I have been a photographer in Fresno, my own business, for 12 years.

The Court: And what camera are you using?

The Witness: We are using—I haven't decided, it depends on how large a field, but we are using in the way of lenses either a Kodak wide field Ektar or a Kodak 6-inch Ektar, or a Voightlander apo lampbar.

The Court: All right. Go ahead and make pictures of those three. Do you take them out to develop them?

The Witness: Yes, they will go to a color lab for processing.

The Court: I see. All right.

Mr. Shepard: I don't want to interfere, but I will stipulate that can be done during the noon hour if he wants.

The Court: You said you didn't want that. You wanted the boxes brought back. I thought you wanted them taken with [439] the same camera.

Mr. Shepard: No, I didn't mean to intimate that, your Honor. I just thought that the boxes during the noon hour or later would be more representative.

The Court: Well, let him take the pictures, whatever he wants to. As long as he has started, let's take them now. And I am not going to allow you to rest; I will have you bring the boxes here, or if he takes them then you will have to call him

(Testimony of Willard Fred Tidyman.)

back and have him testify that he has taken them. Can you photograph all three at the same time?

The Witness: All the fruit?

The Court: The three sacks, that's all there is. Could you photograph them all? Why don't you do that?

Mr. Griswold: Yes, that was my intention, and so that the exhibit numbers would show in front of each group.

The Court: Yes.

Mr. Griswold: If the clerk could do that, locate the contents and place it so the exhibits will show in front of each group.

The Court: All right. Go ahead, Mr. Eiland, they've got work for you.

Mr. Griswold: That is the only way I can see we could have a complete record of the case.

The Witness: You arrange them right down there (indicating).

The Court: Could they be taken through the cellophane? [440]

The Witness: No.

The Court: Mr. Photographer, you arrange them to suit yourself. You are the authority on that subject.

The Witness: Yes, sir.

(After taking pictures.)

I feel that is sufficient of these.

The Court: All right. They will be returned, and when you furnish the prints they will be filed

(Testimony of Willard Fred Tidyman.)

as an exhibit in the case, as being a photograph of the fruit in the sacks.

Now, gentlemen, the problem arises, the boxes are not here and the boxes are not marked. If they are to be taken here, of course, we could have Professor Braun identify each box, but it occurs to me it takes a lot of time and I think the photographer would be happier if we let him do it in his own studio. Wouldn't you, where you have the paraphernalia that you need?

The Witness: Yes, I would.

The Court: Wouldn't you like to have those boxes? Wouldn't it be easier to do them in your studio?

The Witness: Yes, it would.

The Court: As Mr. Braun is under oath, suppose we designate then, and counsel for the plaintiff may have a representative there, Mr. Braun as a witness to identify or make cards that could be photographed showing each box as he identified them here, and then he can later testify that he placed them on, and in that way we would save time. [441]

Mr. Shepard: I will so stipulate, your Honor. It is not necessary for Mr. Braun to come and testify. I will stipulate that he can take the fruit to the photographer, and make the labels.

The Court: All right. You make labels that can be reproduced, and identify the boxes.

Mr. Braun: Your Honor, that referred to the three boxes that were here?

The Court: Yes, that is all. The boxes from

(Testimony of Willard Fred Tidyman.)

which you took the samples, and then you can identify them. You can write there, box so and so, from which sample, exhibit, whatever the number is, in script that will show in the photograph. But we are trying to save time, that is all. And then when the prints are ready, they can be brought in and put into evidence in some manner.

Mr. Shepard: So stipulate, your Honor.

The Court: Why don't we give them numbers now?

Mr. Griswold: Could we give them the same numbers or designations in relation to the three samples of which the pictures were taken?

The Court: You can call the photo "A" as being a picture of the samples in court, three different exhibits.

Mr. Houk: Exhibits F, G and H.

The Court: Have we got a number after that?

The Clerk: We are through L. [442]

The Court: We are down through L. Well, then we can take one and call that F-1, being a photograph of the sample fruits in the three bags. Then which box shall we use first? Which is the earliest? What is F?

The Clerk: F is Tagus ranch.

The Court: All right. Then F-1 will be a photograph of all three. Then F-2 will be the box from the Tagus ranch; we will give it a number, and the clerk can mark it later on when the photo comes. Then we will have G-1, which will be a photograph of the box from which?

Mr. Shepard: That is the Red King original.

(Testimony of Willard Fred Tidyman.)

The Court: Red King original. All right.

Mr. Shepard: H is the Red King, Hagler orchard.

The Court: H-1. You see? Then you can put on the box the same identification. We are using F-2, G-1 and H-1 in that order. That identifies them, and when the photographs come turn them over to the clerk. Get them as quickly as possible. It is evident we can't finish today. How long will it take? Could I have them by Monday?

The Witness: No, sir.

The Court: Why?

The Witness: It is impossible physically.

The Court: Do you send them to a laboratory out of town?

The Witness: Yes, sir.

The Court: Oh, I see. All right. Then we will take [443] them whenever we get them.

The Witness: It will be next week.

The Court: All right. Next week is a long week.

Mr. Griswold: The defendant rests.

The Court: With that you rest. All right. You may withdraw from the courtroom, Mr. Photographer.

In order to gauge our time, gentlemen, how much time will you want for rebuttal?

Mr. Shepard: I think I could finish this afternoon, your Honor.

The Court: Well, I will say this, gentlemen, whether we finish this afternoon or not, it will be late and even if all the testimony is in I will con-

tinue the case to Monday and hear arguments on Monday. I have already cancelled the law and motion matters in Los Angeles, and we will hear the argument. Tuesday is a holiday, and on Wednesday I have a criminal case to try without a jury. So in that manner we will have time and you can organize your arguments.

Mr. Shepard: Ten o'clock on Monday?

The Court: Yes, the regular time, because I have no calendar here Monday, unless an emergency matter.

This has occurred to me, gentlemen: ordinarily I don't think in a case of this character a view of the premises is indicated, but if either of you feel that viewing the tree might help, I am willing to go out, if you will take me out [444] there, and take the reporter along and the clerk, and view the tree. I am not interested in viewing the premises, because we would have to view the Tagus ranch and everything else, but if viewing the tree would in your opinion be helpful, I would be very glad to do it. It shouldn't take us very long. How far is it?

Mr. Griswold: About 30 miles. I thought of that, and I think that would be very helpful if we could stipulate for a view of the particular tree.

Mr. Shepard: I don't believe that it would be—well, I don't know, really.

The Court: I am assuming that a tree that has been grafted will show signs of graft for a long time after.

Mr. Shepard: That is just what I assumed. I think that is not true, your Honor.

The Court: It isn't?

Mr. Shepard: With due respect to your Honor.

The Court: Well, I don't know, I haven't engaged in agriculture.

Mr. Shepard: My experts tell me otherwise.

Mr. Griswold: We would stipulate, and as a matter of fact I think it would be helpful for the tree to be viewed by the Court.

The Court: Well, if counsel says there is no sign by which it can be pointed out by either side as showing graft [445] or not graft, then viewing the tree itself wouldn't go above the testimony which has been given here as to what took place.

Mr. Shepard: I don't think it would be helpful, your Honor.

The Court: Well, think about it. If you wish, we can even do it after the argument and we can make a record of what was done. I have gone all sorts of places, including Death Valley, to view premises in conjunction with lawsuits we have had.

All right, gentlemen, we will convene at 1:30, because I can't possibly go beyond 4:30 and take that plane I am to take to Los Angeles. I have to take the plane to Los Angeles tonight, so we better convene at 1:30.

(Thereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [446]

Afternoon Session—1:30 P.M.

The Court: All right, gentlemen, proceed.

Mr. Shepard: We will call Dr. Olmo, Dr. Harold P. Olmo.

HAROLD P. OLMO,

called as a witness by plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Harold P. Olmo, O-l-m-o.

Direct Examination

By Mr. Shepard:

Q. Dr. Olmo, will you give us your address, your residence?

A. Box 102, Davis, California.

Q. And what is your occupation?

A. I am professor of viticulture at the University of California.

Q. At Davis? A. At Davis.

Q. How long have you been teaching at that institution? A. About 25 years.

Q. And everybody has been taking down their hair around here, so I will ask you your age?

A. My age is 49.

Q. All right. Now, will you tell us where you took [447] your undergraduate college work?

A. Undergraduate college work, I took both at Berkeley and Davis.

Q. Both in the University of California?

(Testimony of Harold P. Olmo.)

A. Both in the University of California.

Q. Did you receive any B.A. or B.S.?

A. I received a B.S. in agriculture at Berkeley and then continued on for Ph.D. in genetics.

Q. And when did you obtain your Ph.D.?

A. In 1933, I believe.

Q. And you mentioned that it was obtained in genetics. Would you explain a little further?

A. Well, I took my graduate work with Professor Roy E. Clausson at Berkeley, who I think was considered one of the outstanding workers in that field in the country.

Q. And was your doctorate on genetics in general as to all life forms, or any specialty?

A. Yes, when you take a doctorate in genetics at the University it is in general genetics, although you may take one particular subject as your thesis subject.

Q. What was that thesis subject?

A. I worked on cyco genetics of tobacco, for the thesis.

Q. And after you received your doctorate what did you do then?

A. I obtained a position at Davis, and then started [448] work in fruit breeding.

Q. And will you tell us generally what courses you have taught at Davis over the years?

A. I have of course taught different courses, but the two courses I have taught most consistently are elementary viticulture, which is grape growing,

(Testimony of Harold P. Olmo.)

and the second course which is an upper division course, the course in fruit breeding.

Q. Now, in addition to these courses, or perhaps part of them you explained, do you do experimental work, or supervise the same?

A. Yes, a large portion of my time is spent on research work in fruit breeding.

Q. And have you had occasion to write any papers, from time to time, on the subject?

A. Yes, I have written a fairly large number of publications.

Q. Would you list some of the publications in which you have published papers?

A. Most of these papers are on cytology and genetics of grapes. I have had graduate students, however, whom I have directed, who have published in other fields of fruit breeding.

Q. Now, has genetics as applied to plant life continued to be one of your specialties or your special interest? [449] A. Yes.

Q. Now, you came down here in response to a subpoena by me last week, is that correct?

A. I did.

Q. And at that time I sent you a letter and a chart, and asked your opinion on it, is that correct? A. Yes.

Q. Now, I would like to introduce, or show you a chart here, which I showed to counsel, showing some of the characteristics of LeGrand and the Red King.

(Testimony of Harold P. Olmo.)

Mr. Shepard: I would like to introduce this for identification, your Honor. I will put on a witness later that will substantiate it.

The Court: It may be marked for identification, Plaintiff's——

The Clerk: 16.

The Court: ——16 for identification.

(The document referred to was marked as Plaintiff's Exhibit 16 for identification.)

Q. (By Mr. Shepard): Now, will you generally explain mutations as they may apply to bud sports in plant life, especially with regard to tree fruit? Will you explain how such things may occur?

A. I should perhaps like to limit this to the case in [450] point. It is a broad subject.

Q. All right. Are you finished with that, Mr. Eiland?

The Clerk: Yes.

Q. (By Mr. Shepard): Now, I hand you, sir, Plaintiff's Exhibit for identification 16. You are familiar with the Le Grand nectarine yourself?

A. I know the Le Grand variety quite well.

Q. You of course have not had a chance to observe the so-called Red King variety?

A. I have observed it on one occasion, fruit only.

Q. Here in court?

A. No, Mr. Taylor brought me some samples several months ago.

(Testimony of Harold P. Olmo.)

Q. But you haven't observed the tree, or anything? A. No, I have not.

Q. Now, then, assuming the characteristics on this chart to be accurate, and I have listed therein the characteristics as to Le Grand and Red King, as to the glands, flowers, stones, flesh color, kernel, ripening period, surface color, russeting, flavor, and size and vigor of tree, among others, I believe. Assuming all those descriptions to be accurate, in your opinion, would it be possible for a bud sport to have developed from the Le Grand tree with all of the characteristics listed in that chart under Red King? [451]

A. Well, I would place that probably as a proposition of probability. I would say it would be nearly impossible to imagine such a thing could occur, in which you had so many individual characters changing simultaneously, or at the same time.

Q. Now, would you explain the basis of that answer?

A. Well, to a geneticist, we know that certain of these characters are inherent in the specific individual character. For example, the leaf gland type is inherited in a certain pattern in one particular lobus or center in the cell, in the chromosome of the cell. If we go to another characteristic, for example, the surface, one is less smooth than the other presumably, or one ripens at a different period than the other. These are characters that are entirely separate as far as we know in inheritance from the

(Testimony of Harold P. Olmo.)

gland type. So you would have to assume that these other changes that had occurred had occurred here in this case simultaneously. Now, for such a thing to happen almost reaches astronomical proportions, because mutation in the peach is not by any means a frequent occurrence. We also have the knowledge about a mutation, or several mutations possibly of the Le Grand itself, in which case the changes are not this widespread, they only affect usually one character.

Q. Now, would you explain a little fuller why you say astronomical chances with reference to the chromosome and genes? [452]

A. Well, let's say the change in leaf gland, as we compare this with other similar known mutations, as far as rate is concerned, one might assume even at the best that it might occur, say, once in 100,000 trees, for example. This would not be outside the general realm of mutation rate for such characters. This would then be one in 100,000. Well, if you were to have a change in ripening, one might assume that it would happen probably in the same way, at least as far as magnitude is concerned, so in order to get both changes combined at the same time, it would mean that you would have to take the product of the two separate mutations which would take you up to one in 100,000 times one in 100,000, or one in a million for two of these changes to occur possibly at the same time. So you can see, using this as a rough example, a rough

(Testimony of Harold P. Olmo.)

approximation, that if you have other differences as well, it gets to be almost astronomical in number.

The other thing is, we do not know of any proven mutations in the peach that combine so many characters simultaneously.

Q. Has there been any such sport mutation known in horticultural experience or history, with such wide variety of characteristics from the so-called parent?

A. There are some examples in other fruits, but there the background problem is different. For example, in apples, [453] you may get multiple changes but these are due actually to another phenomenon which is fairly well understood, not mutation itself but rather loss of chromosome material.

Q. Is there a difference in the number of chromosomes between peaches and apples?

A. Yes, the peach is fairly simple in its chromosome constitution. There are 16 chromosomes in the cells, in the growing cells. In the apple there are 34 and it is a complex group.

Q. There may be more possibility of change with more chromosome structures?

A. Yes, that is quite true.

Mr. Shepard: I have no further questions.

The Court: Cross-examine.

Cross-Examination

By Mr. Griswold:

Q. Several months ago you inspected samples of

(Testimony of Harold P. Olmo.)

Red King? A. Yes.

Q. And that was Mr. Taylor, who is in court, who brought them to you at Davis, California?

A. He did. He brought me also a sample of the Sun Grand, I take it, along with it.

Q. Did you make any tests of those two varieties?

A. After he left I compared the two samples of fruit, and I could find no apparent differences, as far as my [454] examination.

Q. Did you make any written record of your study? A. I did not.

Q. Will you describe in detail what you did in work between the two fruits, the Red King and the Sun Grand? Can you fix the date more specifically?

A. I believe it was toward the end of August. I would like to check with Mr. Taylor on it; he can probably be more specific.

Q. That is good enough. Now tell us in detail what work you did on the two varieties?

A. I made only a superficial examination. I looked at the skin and the color, and also cut the fruits open and looked at the pits, but I considered the sample rather small. I don't recall the exact number, but he had only probably six or eight fruits, I believe, of each.

Q. Would you say too small a sample to make a determination?

A. Well, as far as determinations go with accuracy, I would say the sample was too small.

(Testimony of Harold P. Olmo.)

Q. And when you say superficial, was that a cursory examination?

A. Yes, I made no measurements, for example, with a caliper, nor did I examine in any other detail.

Q. You heard the description here as to the various [455] methods of determining the varieties, according to Blake and Edgerton. You are familiar with that publication? A. I am.

Q. And would you say that that is somewhat a standard in the United States for classification from a variety standpoint?

Mr. Shepard: I object to the question as being ambiguous. I don't know what standard he is talking about.

Mr. Griswold: Standard for classification of peach or nectarine varieties.

Mr. Shepard: There have been several, counsel. I don't know which one he is referring to.

Mr. Griswold: Blake and Edgerton.

Mr. Shepard: Do they have the classification system set up?

Mr. Griswold: He said he was familiar with that.

The Court: Well, overruled. Go ahead.

A. They do mention characters in there that might be used for classification, although there are many systems that could be used.

Q. (By Mr. Griswold): What other systems are there?

(Testimony of Harold P. Olmo.)

A. Well, for example, this French work, Souty and Caillavet, point out another method.

Q. Well, what else can you do? You heard Mr. Braun [456] testify, did you not? What else can you do, what other physical objective or other measurements or observations can be made in order to determine a difference or a variety?

A. I can give you methods that might be quite satisfactory, but I don't know whether you would want to accept them. Of course, the obvious thing would be to put the two varieties under the same environment; in other words, graft them on the same tree. Perhaps an alternate way is duplicate that a number of times and make comparisons on that basis. I certainly didn't mean to indicate that I considered the two fruit specimens the same from the samples I had. I stated merely that I could not tell any difference by superficial examination, but I admit that a comparison should go much farther than this.

Q. In other words, a layman might wonder whether the pits are important, or the taste of the kernel is important. You agree that there must be a process of elimination of many factors?

A. All factors should be considered.

Q. You have observed the exhibits which I have placed before you? A. Yes.

Mr. Shepard: What are those?

Mr. Griswold: Those are Exhibits H, F and G.

Q. Are you able to express an opinion on your

(Testimony of Harold P. Olmo.)

observation [457] of those fruits, as to their varieties?

A. I don't think one should express an opinion on a variety on the basis of a few fruit, especially if they are picked from different orchards and may be sampled differently.

Q. You have testified that a sport, in the hypothetical case given to you, is possible?

Mr. Shepard: He didn't say it was possible. Use his words.

Mr. Griswold: Well, I misunderstood then.

The Court: I think he said it is a possibility but he doubted it.

The Witness: Very remote.

The Court: Very remote.

The Witness: I indicated by a distinct example that it would be a very remote possibility, so remote that one could consider it practically impossible. Does that clarify the statement?

Q. (By Mr. Griswold): That is the way I understood. You place it in the matter of possibility of occurring given the set of facts which you have on that paper? A. Yes.

Q. Now, assume that the root stock was a peach, a seedling peach as has been testified here by Mr. Kim, assume a seedling peach, and a sport having the characteristics of the Red King, an unknown peach seedling root and a sport or mutation [458] growing on that unknown—we don't know the characteristics of that peach—what would you say

(Testimony of Harold P. Olmo.)

would be the probability in nature of that occurring?

A. From a sport of an unknown peach?

Q. Yes. A. From what?

Q. To a Red King, having all the characteristics that have been testified here, the photographs you have seen? You have seen the slides, have you not? You saw the slides?

A. Yes. I didn't see all of them, I guess I saw most of them.

Q. What I am asking, you have testified——

The Court: Now, you are going into another question. Give the gentleman a chance to answer one question at a time.

Mr. Griswold: Did you understand the question?

The Witness: Would you repeat it, please?

The Court: Let the reporter read it. Please, Miss Schulke.

(Question read.)

A. Well, I can answer that in this way: of all the millions of peach trees that are grown, only one verified instance in California has been found where a nectarine has arisen from a peach.

Q. (By Mr. Griswold): What is that?

A. And that is a Sequoia nectarine coming from a [459] Hutchinson peach. There is no other instance that I know of that has been properly verified where such a mutation has occurred. Does that answer your question?

Q. Yes. Do you know how many peach trees

(Testimony of Harold P. Olmo.)

that would come from? What is the basis there? How many peach trees would you say?

A. Well, this would of course include all the peach trees we have grown, apparently under observation, since the beginning of peach culture here. At least if they occurred they were certainly never reported.

Q. Well, that's an important point. Would you say that all mutations are discovered?

A. Oh, by no means, that would be silly.

Q. So that it is a question, in addition to the occurrence, also the discovery of that occurrence?

A. Right.

Q. So you have two variables? A. Right.

Q. Are you familiar with the Gold King?

A. I have seen specimens of it. I am not too familiar with the variety as a whole.

Q. Do you know how it was derived?

A. Yes, I understand it was reported to be a sport of the Le Grand.

Q. That would be in addition—you said peach, the [460] Sequoia came from a peach.

A. That is right, but you asked that question. You asked if I had known of a peach being derived from a nectarine, did you not?

Q. Yes. The Gold King, as you said, is a sport from? A. The Le Grand.

Q. The Le Grand. Am I correct that of varieties of fruit and trees, that nectarines are one that is the classical example of mutation?

(Testimony of Harold P. Olmo.)

A. It can be used as a good example of mutation, but it is certainly not classical.

Q. Well, I read that in the *Encyclopedia Britannica*——

The Court: Well, is it in the sense that mutations occur more often than would in the parent tree, as we call it? Is that a good expression, calling the tree the parent tree?

The Witness: Yes, it would be. In other words, it is a derivative of the peach.

The Court: Well, the chances of a sport deriving from a nectarine would be as rare as a sport deriving from a peach?

The Witness: You mean a new nectarine derived from another nectarine?

The Court: Yes.

The Witness: I don't know, your Honor. Probably not much difference as far as mutation rate is concerned.

The Court: How do you account for the large number of [461] nectarines which are classified as distinct?

The Witness: Well, because many of them, after the appearance of original changes from the peach, are related in the sense that they are seedling. Once you obtain a nectarine if you fertilize the nectarine you continue to get nectarines; you don't go back to the peach.

The Court: That is right. So these varieties are what, this large variety?

The Witness: This large variety of nectarines

(Testimony of Harold P. Olmo.)

are simply seedlings of nectarine grown mainly although they may come occasionally from peaches.

The Court: I see.

Q. (By Mr. Griswold): Is there any literature on this precise subject we are dealing with here, namely mutations in peaches and nectarines?

A. I would say that the exact scientific study of these mutations is rather recent, and I don't believe there is much published work on it.

Q. Well, is there anything published on mutations in nectarines? A. Yes, there is.

Q. Will you state it?

A. There is a piece of work done by Dr. Derman of the United States Department of Agriculture several years ago, [462] describing the several nectarine mutations.

Q. Which ones?

A. Well, now, I can think of a little bit here. There is one that apparently was derived from the J. H. Hale.

Q. A nectarine from a J. H. Hale?

A. Yes, but that was an unstable type.

Q. That makes two that came from a peach, the Sequoia, and what was the last?

A. This happened in New Jersey. I said within California before, did I not?

The Court: I don't think you limited it.

The Witness: Yes, I said with all the peaches grown in California, only this one had a sport to my knowledge.

Q. (By Mr. Griswold): This other one in New

(Testimony of Harold P. Olmo.)

Jersey that mutated from a peach to a nectarine?

A. It is not a complete mutation, as far as I know it is still not a good nectarine variety.

Q. Do you have a copy of that bulletin or study with you?

A. No, I do not have one with me, but I could furnish you with the reference.

Q. Did you read it over before coming here?

A. No, I did not; I read it several years ago.

Q. Are there any other books that deal with this precise matter of mutations in nectarines? [463]

A. Oh, of course, if you want to go into some of the old works, Charles Darwin's book, he mentions nectarines.

Q. You mean the *Origin of the Species*?

A. Yes, not in the *Origin of the Species*, but variations in animal and plant domestication, a different book.

Q. Now, you have expressed yourself in numerical number, which I would like for you to consider, what the probabilities of—the probabilities of this sport occurring with the characteristics of Red King, assuming for the purpose of this question consistency in the parent from which the sport arises, that is, consistency in characteristics?

A. Well, you only mentioned a single sport known of the Le Grand, is that correct, which is the Gold King?

Q. No, I am speaking now of the Red King. Assume no conflicts in characteristics so that you don't have multiple changes, what then would be

(Testimony of Harold P. Olmo.)

your opinion as to the probability of this sport occurring from such a parent?

A. Oh, I can't conceive of it having originated from Le Grand with this many differences.

Q. I am now asking of a parent, for the purpose of this question you can assume a peach, a seedling peach was planted there, and that a sport developed from that seedling peach. My question is, what probability is there of that occurring, assuming no multiple conflicts in characteristics—you can forget the Le Grand—assume a peach root or a parent, can [464] you express that in degree of probability?

Mr. Shepard: I object to the question as being ambiguous. Do you mean a peach that changed to a nectarine, just one change?

Mr. Griswold: With the characteristics of Red King, all of the characteristics of Red King, that is my question.

A. Well, this is my point, this does not seem to be a single mutation; in other words, the globose glands is one character, for example, genetically speaking; these other characters would obviously have to be due to other genetic mutations of a different kind, and as I pointed out before as these occur simultaneously from the Le Grand is an extremely remote possibility.

The Court: I gather then that in your view, assuming these changes are real, there are two distinct fruits, two distinct nectarines?

(Testimony of Harold P. Olmo.)

The Witness: No, we are talking now, your Honor, about the Red Grand as having originated—or rather, the Red King having originated from the Le Grand.

The Court: Yes, that's right.

The Witness: Which are two quite distinctly different varieties. In other words—

The Court: Then in your view the change is so great it could not have originated as a sport from the other, is that it?

The Witness: That is right, the changes are not simple [465] changes, they involve several distinct and different characters.

The Court. Then I gather—this in the realm of opinion, but I want your answer although it is the type of answer by an expert by which I am not bound.

The Witness: Yes.

The Court: Then in your view you would eliminate mutation as a basis; then what would you attribute the presence of—let's use a medical term, the incidence of so many changes to?

The Witness: It might be—I don't know. I cannot explain it on the basis of mutation, so I have no other alternative.

The Court: But without looking at the fruit you said you cannot—we have got lugs here but we have been carrying them back and forth, photographing them, so we don't have any larger amount of fruit such as we had here yesterday—you were not here when the lugs were here yesterday, were you?

(Testimony of Harold P. Olmo.)

The Witness: I was here yesterday.

The Court: Did you look at those boxes?

The Witness: Yes, your Honor.

The Court: Did you see the boxes?

The Witness: Yes, your Honor.

The Court: Now, assuming the distinctions which are pointed on the charts are real, have you any opinion as to what may have caused them in the nectarine which is known as [466] the Red King?

The Witness: I can't think of any.

The Court: You can't think of any?

The Witness: No, except perhaps it might have arisen from a seedling that could have been a separate plant, which of course is not a mutation.

The Court: Well, would a seedling be likely to produce the variety of changes and characteristics which are noted on that chart?

The Witness: Oh, yes, that might be possible.

The Court: My subject is variety. I didn't hear your answer.

The Witness: I think it would be much more reasonable to suspect that such a variety might have arisen as a seedling rather than as a mutation directly from the Le Grand.

The Court: All right. Any further questions?

Mr. Griswold: Just one or two more, your Honor.

Q. Assume that this particular tree, which was supposed to be a Le Grand, was in fact a seedling tree, what is the chance in nature of producing fruit like the Red King?

(Testimony of Harold P. Olmo.)

A. I would say very remote.

Q. Can you express it in probabilities?

A. No, I could not. This depends, of course, on the starting point, what peaches were in the neighborhood.

Q. Let's assume this, let's assume that a farmer orders [467] a Le Grand orchard in 1950, and that orchard comes into bearing in 1954; one of the trees produces—it's on a peach root of unknown variety, one limb produces Le Grand nectarines and another limb which grew naturally from the base at about 15 inches produces the Red King, which you have observed, that no human agency touched that tree; what would be your opinion for that occurrence?

A. Practically nil. I don't see how it could happen.

Q. But if it did happen what is your opinion?
The Court: He says it couldn't.

The Witness: That is my answer, it is practically nil, it couldn't have.

Q. (By Mr. Griswold): Well, you have considered a moment ago a seedling could be responsible.

The Court: You pronounce it the Latin way, nil, isn't that correct? I want it for the benefit of the reporter.

The Witness: If I understand you correctly, counsel, you said the peach, this peach tree would give rise to one branch that was Le Grand nectarine

(Testimony of Harold P. Olmo.)

and to another branch that was Red King, is that correct?

Q. (By Mr. Griswold): Yes.

A. I would say the possibility of that happening would be nil. [468]

Q. You mean it is impossible.

A. Impossible. I want to make this further statement, this assumption is that this original peach tree was not manipulated in any way; it was a natural growth?

The Court: That was the assumption you were to make, from the testimony that was offered that this tree was not grafted, nothing was done to it except this growth was observed, shown to people, examined, and they produced trees and afterwards from the buds of the tree other trees were grown.

The Witness: Thank you, your Honor.

Q. (By Mr. Griswold): I will ask you just a couple more questions. How could a seedling produce this Red King?

A. Well, this can be explained by any plant breeder. Obviously, you can get seeds of nectarines and plant them and obtain other varieties, but of course you would never expect to exactly duplicate Red King or any other variety, because this would be almost impossible. There are a lot of genetic factors involved in making up a variety.

Q. There is a school of thought that all plant and life form in a series of interrelated mutations?

A. I have never heard of such a theory unless you state it in other words.

(Testimony of Harold P. Olmo.)

Q. Well, aren't we humans—a school of thought that we [469] humans are the end result of a series of mutations?

A. No, I don't know of any school of thought with that idea.

Q. Well, plant and life forms change, do they not, over the millions of years recorded in the rock geologically? How do you explain those changes?

A. Yes, these changes can be explained on that position.

The Court: I think we are getting far away now, pretty soon we will land in Russia. I don't think either Mr. Braun or the witness would want to discuss the mutations he is supposed to have brought about.

Mr. Griswold: Just one more.

Q. You have given us two cases of mutations of nectarine from peach. Are there any more you can think of?

A. There are other recorded cases in the literature. I mentioned Darwin. He mentioned the early Rivers which is an old nectarine variety that was originated from the peach. That was hearsay.

Q. That was in England? A. Yes.

Q. And any others that you can recall?

A. Those were all that I recall.

The Court: To what tree did you apply the name Hutchinson? Didn't I hear the word Hutchinson?

(Testimony of Harold P. Olmo.)

The Witness: I mentioned the single case in California, [470] the appearance of the Sequoia nectarine originating from a Hutchinson peach.

The Court: Hutchinson.

The Witness: This happened down near Poplar, Mr. Williams' orchard.

The Court: All right.

Q. (By Mr. Griswold): Do you know how many varieties of nectarines are grown in California?

A. The total number?

Q. Yes.

A. I don't believe anybody knows exactly.

Q. Do you know all their names?

A. I would say that I know most of the names.

Q. And do experts sometimes have trouble making a distinction between the various varieties?

A. You bet they do.

Mr. Griswold: No further questions.

Redirect Examination

By Mr. Shepard:

Q. Dr. Olmo, on such occasions as sports do occur, or have occurred, do they generally sport to better or poorer characteristics than the parent?

A. I would say that most sports appearing are poorer than the parent. [471]

The Court: Well, doesn't subsequent cultivation take care of that?

The Witness: No, because most of these changes

(Testimony of Harold P. Olmo.)

are at random, most of the random changes from the standpoint that we look upon a variety was unfavorable. This is a natural consequence of mutation itself.

Mr. Shepard: I think that is all I have.

The Court: All right, doctor, step down.

The Witness: Thank you, your Honor.

Mr. Shepard: May the doctor be excused?

Mr. Griswold: Yes.

The Court: Yes, he may be excused. Call your next witness.

Mr. Shepard: We will call Mr. Girozian.

VAUGHN GIROZIAN,

called as a witness by plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Vaughn Girozian.

The Clerk: Have that seat.

Direct Examination

By Mr. Shepard:

Q. Mr. Girozian, where do you live?

A. I live at 1839 Country Club Lane, in Fresno.

Q. And do you have a packing house in Kingsburg? [472]

A. Yes, sir.

Q. And you have regularly been the shipper of Mr. Lyle Hagler's fruit?

A. Yes, sir.

Q. In recent years?

A. Yes, sir.

Q. And did you bring with you records of the pack-out sizes of Mr. Lyle Hagler's fruit for the 1958 season, that is in regard to the Red Kings?

A. Yes, sir.

Q. Do we have those here?

A. You have got them (indicating counsel).

The Court: To whom were you pointing?

The Witness: One of the attorneys down there.

The Court: All right. We won't take them away from you. We will just use them and return them.

The Witness: I'm not scared of that.

Mr. Houk: I thought those were Lyle's, that is why I didn't bring them up.

The Witness: You want 1958?

Q. (By Mr. Shepard): Yes. Can you read them to us, or how do you have them listed?

A. I've got them all listed by date, I guess. Well, you see, your Honor, my dates—they pick the fruit on a [473] certain date but then when it is packed it is put in cold storage and maybe we sell them a week or ten days later.

The Court: What does that indicate?

The Witness: This indicates on 7-9-58, manifest 307—you want the dates of the manifests?

Q. (By Mr. Shepard): Let me state, I am not interested in the dates. I am just interested in the pack-out sizes.

The Court: Oh, the pack-out sizes. Have you got it in sizes?

The Witness: Yes, sir.

The Court: All right, then give him the dates and the sizes.

(Testimony of Vaughn Girozian.)

Q. (By Mr. Shepard): The sizes and number of lugs.

A. Not the dates. All right. 7-9, 284 88s, and on the same day——

Q. 204? A. 284.

Q. All right, go ahead.

A. And on the same day there was 86 90s, on 7-5 there was nine 60s——

Q. Wait a minute, 960?

A. No, nine 60 size.

Q. Oh, nine 60s. [474]

A. Yes, and seven 64s. On 7-5 there were 13 96s; on 7-18 there were 8 60s and 2 64s.

Q. Eight what? A. Eight 60 size.

Q. Yes. A. And two 64s.

Q. All right.

A. On 7-3 there was 46 60s, 45 64s. On 7-3 there was 37 88s——

Q. 37 what?

A. 37 88 sizes, and 2 96s. On 7-21 there was 6 60s and 5 64s. On 7-10 there was 240 70s. On 7-15 there was 268 80s and 21 84s. On 7-19 there was one 56 and ten 60s. And on 8-3 there was 54 84s and 25 96s.

Q. That is the total pack-out of the Red King nectarines from the Lyle Hagler ranch in 1958?

A. Just a minute. Does that total up 4409? There must be another set.

The Court: You must be a good mathematician, you can look at that and tell.

(Testimony of Vaughn Girozian.)

Mr. Shepard: I think it totals about 1,000, 1,500.

The Court: Perhaps there is another sheet. Some of you gentlemen at the table can help, you have seen these?

Mr. Griswold: No, I can't, your Honor.

The Court: Can you help, Mr. Byrnes? [475]

Mr. Byrnes: Yes.

The Witness: That is near 1174. They must have skipped the other page.

Mr. Byrnes: We tried to photostat these.

(Conference between witness and Mr. Byrnes, looking through papers.)

The Witness: I notice here 67, and over here total boxes sold, so obviously there were 20 more boxes of some sizes there.

Mr. Shepard: You have a double column here.

Mr. Byrnes: Did you get both those?

The Witness: 289 88s, and here is 371 70s and 561 80s.

Mr. Byrnes: You have three columns, there is your trouble. Let me check those columns for you.

Mr. Shepard: Give me his name there again, for the record.

Mr. Byrnes: David Byrnes is my name. Do you want the dates as well?

Mr. Shepard: Just read the dates because I took those down.

The Court: Do it the way you read them.

The Witness: All right. 7-5, July 5th, there was

(Testimony of Vaughn Girozian.)

an additional 271 70s, 561 80s, 36 84s and 148 88s. On July 18th there was an additional 159 70s; on July 3rd there was an additional 423 70s, and 360 80s; on July 10th there was [476] 555 80s and 57 84s; on July 15th there was 127 88s and 69 96s; on July 19th there was an additional three 64s, 73 70s, 85 80s and eight 84s. I am going to make an entry to see if we did get them all. I have 4229, that is close enough.

The Court: That is close enough. We have all the dates.

Mr. Shepard: We have no further questions of the witness.

The Court: Any questions, Mr. Griswold?

Cross-Examination

By Mr. Griswold:

Q. Just one question, your Honor. This Gold King, you packed this for how long?

A. We just packed about 269 in '56, and I think a little over 4,000 in '57, and forty-two, whatever it was now in 1958.

Q. Red King, I am sorry. So you have seen considerable quantities going through your shed?

A. Well, through Mr. Hagler's shed.

Q. How is that fruit packed when it comes in from the orchard? Just describe the operation.

A. Well, they pick it in the field, like I told Mr. Hagler, they pick it a little on the green side; if we would let it ripen more we would have gained

(Testimony of Vaughn Girozian.)

size, all the 80s would be 70s, but we like to ship it a little on the green side when we ship to New York and long distances, and so we pick it about three or four days earlier than it should be. [477]

Q. That would explain the sizes you have described? A. Yes.

Q. What I want to ask you is this, when they pick this fruit, the Red King, out in the field and bring it to the shed, it is repacked, is it not?

A. Yes, all sizes are in the boxes and the girls get three or four lugs and they segregate different sizes.

Q. And that is poured on a moving belt?

A. Yes, it is on a belt where the girls sort them out, put different sizes in different boxes.

Q. And there are some 50 or 60 girls who pick the fruit out? A. Yes, we have about 80.

Q. When did you first learn of the Red King?

A. Well, I was in the office, I do all the selling there, and Mr. Hagler brought it in to me and showed it to me, I think that was in '54, if I am not mistaken, and he asked me what I thought about it, and I——

Mr. Shepard: Now, just a moment, we object to the conversation.

Mr. Griswold: Yes.

The Court: All right.

The Witness: Is it O.K. to go ahead, your Honor?

The Court: No. [478]

(Testimony of Vaughn Girozian.)

Q. (By Mr. Griswold): How long have you been in the fruit business?

A. Oh, I have been in the fruit business ever since I was 16; I used to help my father do the field work, and in 1934 I went into business for myself.

Q. And in a normal year what is your total sales of fruit?

A. Well, last year we shipped 605,000 packages of just tree fruit alone.

Q. What would that be worth? I mean your gross receipts from the sales?

A. Oh, around two and a half million to two and three-quarters million dollars worth.

Q. And you sell in all the eastern markets?

A. All over the United States, and export.

Q. Are you familiar with the variety known as Sun Grand, or plant patent 974?

Mr. Shepard: Now, if your Honor please, I am——

The Court: That is not cross-examination.

Mr. Shepard: Quite obviously I had to call a hostile witness to get certain information for my case. I don't think he should go beyond what I did on direct.

The Court: You can call him back later on. You didn't call him as a hostile witness. You called him to get information, you got the information you wanted. But you can't use [479] him for a different purpose. He is available if you want to use him in surrebuttal, or whatever you call it, and I will ask him to remain.

Mr. Griswold: Thank you, your Honor. That is all I have. I will ask Mr. Girozian to remain in the courtroom.

The Court: Well, all right. Just step down. Just remain in the courtroom.

Mr. Shepard: We call Mr. Taylor back to the stand.

JAMES WILLIAM TAYLOR

a witness for plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows.

Direct Examination

By Mr. Shepard:

Q. Mr. Taylor, will you——

The Court: Mr. Taylor was sworn before.

Q. (By Mr. Shepard): ——examine Plaintiff's Exhibit 16 for identification. Are you familiar with the characteristics of the LeGrand fruit shown thereon?

A. Yes, sir.

Q. And insofar as those characteristics have run, would you say that those are accurate descriptions of the LeGrand nectarine?

A. As far as descriptive data goes, yes, as they refer to the LeGrand, that is correct. [480]

Q. Are there comparable characteristics given as to the so-called Red King, the accused fruit here in this trial, and which you have seen? Are those comparable characteristics listed under Red King, in your opinion, accurate?

A. As in comparison to LeGrand they are.

(Testimony of James William Taylor.)

Mr. Shepard: We ask that be introduced as an exhibit, your Honor.

The Court: It may be received. That is the chart you presented to Dr. Olmo?

Mr. Shepard: Yes, your Honor.

(The document heretofore marked for identification as Plaintiff's Exhibit 16, was received in evidence.)

The Court: All right. Did you take that chart to Dr. Olmo?

The Witness: No, I did not take it to Dr. Olmo.

The Court: Well, I thought——

Mr. Shepard: I mailed it to him, your Honor.

The Court: That's all right. You don't need additional foundation.

Mr. Griswold: Who made up the information? May we have that in the record?

Mr. Shepard: Yes, I would be quite happy.

Q. You and Mr. Anderson originally gave me that information on questions?

A. That is right.

The Court: All right. [481]

Q. (By Mr. Shepard): Now, are you familiar with the Gold King nectarines, have observed them and seen them?

A. I have observed samples of it.

Q. And have you observed it sufficiently to know the characteristics or description of it insofar as the characteristics we have on that chart, No. 16?

A. Yes, as far as the fruit characteristics.

(Testimony of James William Taylor.)

Q. Are you familiar with the characteristics was the question?

A. Yes, I am familiar with the characteristics.

Q. Let me ask you another question: What is the characteristic as to glands of the Gold King?

A. Reniform.

Q. What is the characteristic as to flowers, between small or large?

A. Large flower.

Q. What are the characteristics as to the stone, whether it is cling or free?

A. It's a clingstone.

Q. And what are the characteristics as to flesh color, is it yellow, white or red?

A. Yellow flesh.

Q. And do you know the characteristic of the kernel, whether it is bitter or sweet? [482]

A. The kernel is bitter.

Q. And does it have a ripening period different than those given on that chart?

A. It's certainly a ripening period different from the chart. I haven't been able to see it over a period of years, so I don't know.

Q. In your best opinion, does it have a different ripening period, as to LeGrand?

A. That's right.

Q. As to the LeGrand surface, is there any difference? A. No.

Q. As to the LeGrand color, is there any difference between Gold King and LeGrand?

(Testimony of James William Taylor.)

A. The coloring is—that is about the same.

Q. As to russeting?

A. Russeting is the same.

Q. That is a term that hasn't been used here before. Would you explain russeting?

A. Russeting is a term that refers to the surface of a fruit, to the roughness.

Q. Would you explain further what you mean by russeting, what aspect of the surface?

A. The smoothness of the surface.

Q. Is that from the pores in the fruit?

A. The russeting there was—there is a [483] pigmentation that also occurs that can be compared, or can be part of russeting.

Q. What does more russeting mean? When a fruit has more russet on it, what do you mean by that?

A. Well, may I refer to another fruit?

Q. Yes, go ahead.

A. In the pear, in the Bartlett pear versus Winter Nelis, there is a roughening surface there.

Q. A rough surface?

A. Well, it is rough and pigmentation also.

Q. As to size, is the Gold King, in your opinion, different in size than the LeGrand, in the general range?

A. In a general range, the range is the same.

Q. And as to the vigor of the Gold King tree, is the tree more vigorous than the LeGrand, or the same, or less?

A. It's the same as——

(Testimony of James William Taylor.)

Q. Did you have occasion to make some pit measurements of the Sun Grand samples and Red King samples?

A. Yes, I made some pit measurements.

Mr. Griswold: Counsel, you have been using the expression Gold King.

Mr. Shepard: Did I say Gold King? I was specifically referring in my last few questions as to the chart to Gold King which is the sport variety you mentioned.

Mr. Griswold: Oh, I thought maybe you were meaning to [484] refer to Red King.

Mr. Shepard: Let me say it again, on the chart are the characteristics of the LeGrand and the Red King. Then I had him through orally and give the characteristics of the Gold King.

The Court: All right.

Mr. Shepard: Now, I am getting back to the Red King, the accused fruit in question, Mr. Taylor.

A. The Red King.

Q. Now, as you have previously testified, you received random samples of the accused fruit from Mr. Anderson, after he brought them back about July 10th, and left them in your refrigerator?

A. That is right.

Q. And you kept those until some time in September, or thereafter, when they began to spoil? Is that correct?

A. That is right.

Q. Now, did you take recently measurements of a number of samples of the pits?

(Testimony of James William Taylor.)

A. Yes, I took a number of measurements of the pits.

Q. And have you prepared a chart of the measurements you made, with an average of those measurements?

A. I compiled the data as I took it on a chart.

Q. Now, how many pit samples did you take?

A. Fifty. [485]

Q. Do you have those here in court?

A. The pits are there.

Q. And you have one bag noted Sun Grand from the Anderson orchard?

A. That is right.

Q. What does that contain, how many pits?

A. The number I measured as 50 pits. I think they are all there. I wouldn't swear to it.

Q. Approximately 50 pits?

A. Approximately.

Q. Are these pits of a random run or lot or what?

A. They were a run, an orchard run.

Mr. Shepard I would like to have this first bag introduced. I don't think they will spoil, your Honor.

The Court: All right. They may be received as what?

The Clerk: 17.

The Court: All right.

(The bag of pits referred to was marked as Plaintiff's Exhibit 17, and was received in evidence.)

(Testimony of James William Taylor.)

Q. (By Mr. Shepard): The next bag is the pits from what samples?

A. These are the pits from the Red King, brought to me.

Q. Were those to your observation pits from different size fruits?

A. They were of different sizes of fruit, yes.

Q. And these contain approximately the 50 [486] you examined?

A. Yes, approximately.

Mr. Shepard: May we have this as the next exhibit for the plaintiff?

The Court: 18. These are the Red Kings?

Mr. Shepard: Yes.

(The bag of pits referred to was marked as Plaintiff's Exhibit No. 18, and was received in evidence.)

Q. (By Mr. Shepard): I show you a chart here—let the Judge see it—what is that chart labeled? The first one is a chart of Sun Grand pits?

A. The first one is of the measurements of the width, length, and thickness of the Sun Grand pits, 50 samples.

Q. From the first bag in evidence here, the random ones from Mr. Anderson's orchard?

A. Yes, that is right.

Q. And the—all right. I will stop there. This contains the measurements of each of the 50 pits?

A. Yes, each of the 50 pits, that is right.

Q. On both sides of the page?

(Testimony of James William Taylor.)

A. That is right.

Q. And at the bottom you have the word 'average'?

A. I have the average of those.

Q. That is the total divided by 50, I take it?

A. Yes, in millimeters. [487]

Q. Now, you have the width also, and the length, and the breadth?

A. Width, length, and thickness. I took those three measurements.

Mr. Shepard: May that be introduced in evidence?

The Court: Well, the Anderson measurements will be 19, and the accused pits will be 20. What did you use, calipers?

The Witness: Yes, calipers, Vernier's calipers, they are closest to the millimeter, however.

The Court: All right.

(The charts referred to were marked as Plaintiff's Exhibits 19 and 20, and were received in evidence.)

Q. (By Mr. Shepard): Now, did you express a ratio of the averages of the width and length?

A. The ratio was included.

Q. On the chart?

A. On the chart, right.

Q. And if you remember—otherwise we will give you back the charts—

A. I would like to have the charts back.

Q. —did that ratio indicate as between the

(Testimony of James William Taylor.)

Sun Grand and the Red King, whether one was proportionately longer, as between width and length, than the other?

A. Those samples are taken from a number of 50 kernels, [488] and I would like to read the number.

The Court: All right. Mr. Eiland will give them back. He wants them back.

The Witness: The data shows that the width of the Red King was 26.7; the length, average length now I am speaking of, and average width, was 35.9. And of the Sun Grand variety from that group, the average width was 26.2 and the average length was 33.8. This data as it is read shows that—points up that the Red King might be suspected to be longer in length than the Sun Grand. However, a sampling such as this is not enough to be significant in that respect in that within that sample there were large fruits and small fruits, and I had no measurements of the fruits previously from which those pits came, so I have no indication that there is a difference because the big fruits obviously have larger pits. The pit is an integral part of the fruit, and therefore, if you have a large fruit you have also a large pit, in relation to a small fruit.

Q. (By Mr. Shepard): Now, is a sample of 50, in the matter of degree, possibly more significant than a sample of ten?

A. Well, a sample of 50—a sample of ten is not representative at all. A sample of 50 is also not representative in the relation to a pit measurement

(Testimony of James William Taylor.)

your fruit—you have a variation in your fruits within one tree. To get [489] significance from that you would have to get an analysis of the fruit from one tree in relation to size. Then in trees within an orchard you have again variations from one tree to the next, and multiplying that again, you would have to run from a large number of orchards to get significant data to point out size. And furthermore, pit sizes, or pit size and pit characters unless extremely large, don't seem to have much significance; at least, I haven't been able to show significance of pits in identification.

Q. In your experience in plant identification, tree fruit identification, do you attach much significance to the pit sizes, unless they are greatly divergent?

A. If they are greatly divergent, of course, practically speaking one might, but in the normal run of our plant breeding work, I do not.

Q. Now, just for the sake of the record, from the 50 samples, does the Sun Grand appear to be thicker than the Red King, or vice versa, or the same, from the average of the 50 pits? What is the measurement?

A. Oh, I didn't read the measurements. Each was 20.5 it happened, in this case the actual measurements and the compilation was the same, but as you go down the list you have a variation from 19 to—well, I am not sure, from 19 to 24, so you have a range.

Q. And it just happens that the average comes

(Testimony of James William Taylor.)

out the— [490] average is the same on your study there.

A. Yes.

Mr. Shepherd: All right, that is all the questions I have. Cross-examine.

The Court: I think, we have been going since 1:30, we had better take a short recess.

(A short recess was taken.)

The Court: Proceed with the cross-examination.

Cross-Examination

By Mr. Houk:

Q. Mr. Taylor, I have here the Exhibits 19 and 20, these two charts.

A. Yes.

Q. These are made out in pencil, is that correct?

A. Yes.

Q. Are these the original figures you made from this test?

A. Let's see. I made a rough sheet, as I was writing them, and I copied it onto that.

Q. And when were these copied onto this?

A. Oh, just the last week.

Q. Pardon?

A. A week ago.

Q. A week ago?

A. About. [491]

Q. Now, this Plaintiff's Exhibit 16, which is a chart here—I will show you, you remember you testified to this?

(Testimony of James William Taylor.)

A. Yes.

Q. That is the parent LeGrand and the Red King sport, is that correct?

A. Yes.

Q. Are there any other characteristics besides those listed here that have any bearing upon the two types of fruit, whether they are similar or dissimilar?

A. There are a great number of characteristics, everything that goes to make up a fruit. Those are a few, those are the more obvious ones.

Q. What do you mean by more obvious?

A. Well, those are the ones that stand out.

Q. More noticeable?

A. More noticeable.

Q. But would have no more bearing than some that might not be so noticeable, is that correct?

A. Well, in comparing fruits, there are many things that go to make up a fruit.

Q. Many things besides these items listed here?

A. Yes.

Q. You were here yesterday when the slides were shown, is that correct?

A. Yes, I was here. [492]

Q. And you saw the slides?

A. They went rather fast, I had a little——

Q. Well, did you see them again this morning?

A. Some of them.

Q. Did you see the pit slides this morning?

A. Yes.

Q. And you saw them yesterday?

(Testimony of James William Taylor.)

A. I saw some of the pit slides, I don't know if I saw them all.

Q. You are referring to this morning?

A. Yes.

Q. Yes. Now, when you saw those pit slides, did you recognize them as to the type of pit they were?

A. I would recognize them as a general type of pit of—

Q. Well—excuse me, go ahead.

A. —of the type of pit that we think of as being in the Sun Grand, LeGrand, or that group.

Q. Each one of those slides was labeled with the name. As you saw those, did you have any disagreement with them as to the type of pits they were, whether they were Sun Grand or Red King?

A. They all looked the same to me as far as classification goes.

Q. Then you don't know which was which? Is that correct?

A. If they were given to me without the label for them, [493] I wouldn't know them.

Q. You wouldn't know. In measuring these pits we have here—maybe I better give you this before I ask you a question—would you tell me what the average was on the width for the—let's take the Gold King and the Sun Grand?

A. I don't have any measurements for the Gold King.

Q. All right, let's take Red King.

A. 26.7 for the width.

(Testimony of James William Taylor.)

Q. What was the width on the Sun Grand?

A. 26.2.

Q. Then the Red King would be wider?

A. No, I wouldn't say that, in relation to—comparing the two varieties.

Q. I am just referring, Mr. Taylor, to these figures.

The Court: Well, that is a question of mathematics, and argument.

Mr. Houk: Very well.

Q. What is the width on the—withdraw that question. What was your figure on the length?

A. The figures on the length, the Sun Grand 33.8, and for the Red King 35.9.

Q. Thank you. Did you make any measurements as to the width and length in inches?

A. Well, an inch is 2.45 centimeters.

Q. Do you have any figures on the width, the range, in [494] inches available on either one of these?

A. No, I don't, but you can divide by 2.54 to get the inches. I believe that is the figure, I would have to be sure.

The Court: Well, it doesn't matter. If anyone wants to have it done, let them do it.

Q. (By Mr. Houk): Now, Mr. Taylor, did you make any other test measurements or checks on any of these nectarines that you haven't told us about?

A. That I haven't told you about?

Q. Yes.

(Testimony of James William Taylor.)

A. What do you mean, I haven't told you about?

Q. Well, are there any other tests you made that you haven't testified to here?

A. In relationship to measurements?

Q. In relationship to these two nectarines, Sun Grand and the Red King?

A. Are you referring to this, or my direct, your cross-examination and my direct testimony?

Q. Well, I will ask you this—withdraw the question since you ask that question, and I will ask you this question: Do you remember yesterday when I cross-examined you, I asked you if you have made any other tests?

A. Yes, when we were referring to the 1957 visit you asked me if I had made any other measurements.

Q. I wasn't referring in my question to any visit. I asked if you made any other tests regarding the differences between these two nectarines?

Mr. Shepard: I object to that as immaterial what the question was.

The Court: I don't think it is material, what he told you yesterday. He told you he doesn't remember, it is lack of memory as to an immaterial matter and that is all there is to it. Suppose he told you he had forgotten about it and he tells you now he has made it, so what.

Mr. Houk: My memory of his testimony yesterday was he said he hadn't made any other tests.

The Court: Well, he was wrong and he produces the result of the test. Suppose he had forgotten,

(Testimony of James William Taylor.)

there is no need to conceal it. Suppose he deliberately did it in order to produce this on cross-examination; it wouldn't mean anything. I am not a jury, you needn't argue and wave your hands and I wouldn't let you do it if there were a jury. All this talk about concealing evidence, most of it is bunk. A man has the right to have his case tried the way he wants to try it, and if the witness wants to keep something for later on, if he wanted to he had a perfect right to do that. As a matter of fact, it would have been improper for him to put this in because it did not become material until you produced exact measurements, so therefore he let you produce your measurements [496] and then he produced his, which is good tactics. So let's not waste time, let's end this, the testimony.

Mr. Houk: Very well, your Honor. I have one more question I would like to ask and that is:

Q. Is it true—I want to be clear on one answer you made. Do you consider this test that you made from the number of pits you have as a definite conclusive test?

A. I made no indication I made a conclusive test.

The Court: No, he said it isn't a good test, and neither is yours of ten.

Mr. Houk: That is all, your Honor .

Mr. Shepard: No questions.

The Court: All right, step down.

Mr. Shepard: Call Mr. Howard Stafford. Mr. Stafford has been sworn previously.

HOWARD STAFFORD

called by plaintiff as a witness in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shepard:

Q. Mr. Stafford, you previously mentioned that you went to the Joseph Hunter orchard in the year 1954, sometime during the summer, and examined a tree or trees in that orchard, one of which was in your opinion a Sun Grand?

A. That is right. [497]

Q. Now, on that occasion you had other people with you; I think you mentioned Mr. Anderson and Mr. Kim?

A. I beg your pardon; I can't remember that particular examination.

The Court: Speak louder.

Q. (By Mr. Shepard): In 1954 when you went to the Hunter orchard——

A. I did go to the Hunter orchard.

Q. ——you remember an occasion when Mr. Anderson and Mr. Kim were with you?

A. That was right.

Q. On that occasion did you see Mr. Joseph Hunter, who has been in court here?

A. I did.

Q. And did you hear a conversation between Mr. Hunter and the members of your group, Anderson, Kim and yourself? A. I did.

(Testimony of Howard Stafford.)

Q. Will you repeat that conversation, as near as you can remember, who said what and so forth?

A. Well, as I remember the conversation, Mr. Hunter was informed——

Q. By whom?

A. By Mr. Kim that—or Mr. Anderson, I could not be certain as to the person who made the statement, but the statement was made that it was a Sun Grand nectarine. [498]

Q. And did Mr. Hunter reply to that statement, or was there some other statement made by either of the parties?

A. Mr. Hunter said that he did not know what the nectarine was.

Q. Just a moment. Go ahead.

A. He did not know what the variety of nectarine was, but how it happened to be there, was that Mr. Roy Riesner had told him that he had discovered a new nectarine and that he would like to work over a couple of trees, and that he had no objection to Mr. Riesner doing so.

Q. This was the statement of Mr. Hunter?

A. That is right.

Q. Now, then, did you have occasion to—strike that. Was Mr. Hunter present sometime during the visit at this tree that you described as Sun Grand?

A. Definitely, he approached us as we were at the tree, and that is where the conversation took place.

Q. And did you look at the tree on which you

(Testimony of Howard Stafford.)

say—well, I am not sure what you testified to. Did you see Sun Grand fruit on the tree?

A. I seen Sun Grand fruit on one tree.

Q. And did you look at the tree, that is the trunk and the limbs of that tree? A. I did.

Q. Now, I will go back for just a moment. Mr. Stafford, [499] you have been in the agricultural business starting when? A. In 1911.

Q. And just briefly sketch your history?

A. I left business college in the fall of 1911, after having something less than a year and a half of high school, and went to work in the nursery business, and have been identified with that business each year during the nursery season especially, with the exception of the year 1920. During the summer months I have followed various other lines of work, such as supervising packing houses, for some 14 years a standardization inspector for the County of Fresno, some four years as state federal inspector.

Q. Now, has part of that experience had to do with grafting and budding?

A. It has, yes, sir.

Q. Now then, looking at that tree where you and Mr. Hunter and Mr. Anderson and Mr. Kim were standing, on which you saw the Sun Grand fruit, did you at that time in 1954 make any observation of anything unusual about that tree?

A. The tree apparently had been grafted.

Q. And what led you to that observation or opinion?

(Testimony of Howard Stafford.)

A. Well, in a grafted tree, or a top worked tree—in the case of a grafted tree you generally find the residue of wax, for one thing. Also the tree has to be topped in order to insert the graft, in this type of grafting; there are other [500] types of grafting, but in this particular type of grafting the tree—the limb is cut off and the graft inserted, and it hadn't completely overgrown.

Q. All right. Now, in the course of years do the marks to which you refer become overgrown or hard to distinguish? A. It is generally so, yes.

Q. And at the present time, with reference to the tree you saw in 1954, that is this year 1958, would you be able to with certainty determine whether there had been a graft work on that tree?

A. I would not.

Mr. Shepard: That is all the questions I have.

The Court: All right. Was Mr. Hunter present at all times while you were making these observations?

The Witness: No, he was not, your Honor.

The Court: Was he present at the time when you discussed evidence which led you to the opinion you state now that the tree was grafted?

The Witness: No, he was not.

The Court: At a subsequent time, in discussing the matter, did you call his attention to the fact you now state?

The Witness: Well, your Honor, he was across the field, he was picking his LeGrand nectarines at

(Testimony of Howard Stafford.)

the time, and he came up to the two trees in question, came up, and at that [501] time he was informed it was our Sun Grand nectarine, as I have so testified, and he of his own initiative admitted the tree had been top worked.

The Court: All right.

Cross-Examination

By Mr. Griswold:

Q. Your testimony is that he told you Mr. Riesner had top worked the tree?

A. He did not say that Mr. Riesner did. My testimony is that he said that Mr. Riesner had come to him and said that he had a new variety he had found and would like to top work, and he told him it would be all right, leading us to the assumption that Mr. Riesner had done the work. I don't know that he had actually.

Q. That is the only time that you had ever been to the Hunter ranch? A. No, sir.

Q. Had you been there before on the Hunter orchard?

A. I was in the Hunter orchard before.

Q. Had you met Mr. Hunter before?

A. I had.

Q. I think you testified you sold this orchard to him?

A. Well, I was manager at the nursery at the time and the orchard was sold to him, whether I was the individual that actually sold him the trees

(Testimony of Howard Stafford.)

I do not know, but I know the [502] trees were delivered to him.

Q. Following this visit in 1954, when did you again return to the Hunter orchard?

A. I returned to the Hunter orchard, as I remember, in company with yourself, I believe, the other attorney, Mr. Vaughn Girozian, Mr. Kim, our attorney Mr. Shepard, myself, there was quite a group, it is a matter of record who was present.

The Court: All right.

Q. (By Mr. Griswold): Which tree were you looking at in 1954?

A. In 1954, we were looking at two trees.

Q. Where were they located?

A. Those trees were located, to the best of my knowledge, were located in the northeast corner of the original planting of LeGrand nectarines.

Q. And which, or did both show evidence of grafting, or just one?

A. Both trees at that time, in my opinion, showed evidence of top working.

Q. By "top working" what do you mean?

A. Top working is either done by budding or by grafting. In this case it appeared to be grafting.

Q. Both trees showed that?

A. As I seen it, yes, sir. [503]

Q. Where was the other tree that you observed?

A. As I remember, that tree was in the same row, running east and west, but west of the tree on which the fruit was found.

(Testimony of Howard Stafford.)

Q. At how many points did you observe this evidence of top grafting?

A. I observed, as I remember, in the one tree, the tree that had the fruit on it. I did not pay too much attention to the other tree because it had no fruit on it. I assumed that it was a Sun Grand from the fact it had the same glands and Mr. Hunter made the statement that he did, I wasn't questioning his statement. But two limbs I believe, as I remember it, were top worked, and there was evidence of another limb being sawed off; the position of them I could not tell you.

Q. You made no sketch? A. No, sir.

Q. Did you make any notes of the trees?

A. No, sir.

Q. Did you make any photographs of this tree?

A. No, sir.

Q. Did anyone else in your presence do so?

A. No, sir.

The Court: On your subsequent visits did you ever see this second tree? That seems to have disappeared, vanished? [504]

The Witness: That is quite true, your Honor.

The Court: You have never seen it?

The Witness: The fact of the matter is the tree when we went with the attorneys apparently was not the same tree.

The Court: Was there an indication it had been dug up or something?

The Witness: No, there was a tree there.

(Testimony of Howard Stafford.)

The Court: But it wasn't the tree you had seen there?

The Witness: That's right. I can't account for that.

The Court: The trees are spaced uniformly?

The Witness: That's right.

The Court: You found a tree, but it wasn't the tree you saw?

The Witness: To the best of my knowledge it wasn't the same tree.

The Court: All right.

Q. (By Mr. Griswold): The tree that was there was about the same size as the rest of the trees in the orchard?

A. Will you repeat the question, please?

Q. The trees were about the same size, were they not?

A. What visit are you speaking of now?

Q. The second visit?

A. The second visit, the trees were approximately the same size, yes. [505]

Q. Now, was there any particular reason why you didn't pay any attention to this tree, the one you can't now locate? Why did you pass over it?

A. It had no fruit on it, and it has been testified many times you cannot make a positive identification without fruit.

Q. Let's assume that a graft had been made, how many years, or what period of time does it take after the graft is inserted before that graft will produce fruit?

(Testimony of Howard Stafford.)

A. Generally speaking, you will lose the first year's crop. I have seen fruit on a graft put in the first year, it is possible that the scion will have fruit, it will produce fruit. Generally it will fall off, though on some it does not. So you can have fruit on a tree, on a graft, grafted in the winter months, you can have fruit the following season, but generally speaking you do not get it until the second year.

Q. How old was this apparent graft that you described that you say you saw evidence of?

A. I have no way of knowing how old it was.

Q. Well, from your experience, you have been in the tree fruit business, how old did it seem to you?

A. I would say that it was two years from graft, that would be as near as I could make a guess, and it is a guess. Some grafts will take off and grow readily, others will not. You can walk up to many grafts that are five and six years [506] old you think should be only one or two.

Q. From the trunk—how big around was this trunk you saw in 1954?

A. Oh, that trunk was probably, the trunk of the tree was probably three and a half to four inches.

Q. And how far from the ground did the trunk fork into the various limbs of the tree?

A. I can't definitely tell you; it is a general practice it is about knee high, about 18 inches, and I think was about so in this case.

Q. Based on your general knowledge then you think it was about 18 inches?

(Testimony of Howard Stafford.)

A. Where it was forked in the original tree.

Q. But you have no independent knowledge?

A. Of this one? I did not measure it, no, sir.

Q. How many divisions were there in that tree, the one that had the fruit on it?

A. As I remember, there were three distinct divisions.

Q. Where were they located?

A. I told you previously I could not state the locations.

Q. Were they three of equal size?

A. No, sir.

Q. Well, describe that to us.

A. Well, the grafted limbs of necessity would have to be at the point—the place where they are grafted, they [507] would be the same size, but above that they would be somewhat smaller.

Q. You say they would be. I am asking you what their condition was when you observed them.

A. Well, the two grafted limbs were smaller than the other limb. The other one, as I remember it, was sawed off. There was nothing on it.

Q. At what point?

A. At a point something like 10 or 12 inches from the crotch of the tree.

Q. Now, directing your attention to the disputed limb or limbs, am I not correct that there was fruit growth from the trunk right on up?

A. In the disputed limb?

Q. Yes.

A. Not at that time, no, sir.

(Testimony of Howard Stafford.)

Q. Well, describe again just what you saw?

The Court: Well, I will sustain the objection. We have gone over this several times. There is no use to have a man repeat seven times what he has already described in the hope you will get a contradiction. Anybody could do that, even you, if you try to repeat the same question and answer. There ought to be a limit to this type of examination.

Q. (By Mr. Griswold): Do you know of your knowledge that a Sun Grand graft [508] was placed on this Hunter tree?

A. Only what was told to me by Mr. Hunter. I do not know who placed it there, or if it was placed there.

Q. I believe you testified you made no sale of the Sun Grand to Mr. Hunter or Mr. Hagler?

A. That is right, that is Mr. C. L. Hagler.

Q. You did nothing after you observed this Sun Grand graft? A. That is right.

Mr. Griswold: No further questions.

The Court: Any redirect.

Redirect Examination

By Mr. Shepard:

Q. The last question, I don't know what counsel meant, your employer wrote a letter to Mr. Hunter in due course?

A. Yes. He asked about what I did. I did not do it. My employer did write a letter.

Mr. Shepard: No questions.

The Court: All right, step down.

Mr. Shepard: Mr. Anderson.

FREDERIC W. ANDERSON

called by plaintiff as a witness in rebuttal, having been previously duly sworn, was examined and testified as follows:

The Court: Mr. Anderson was on the stand for a long while, and I want his testimony confined strictly to rebuttal. [509]

Direct Examination

By Mr. Savage:

Q. Mr. Anderson, do you have the pack-out statement there? A. I do.

Mr. Savage: I would like, without further comment to offer these government reports, and have them marked, this gives the ripening dates and the pack-outs, and so forth.

The Court: May be received.

The Clerk: That will be 21.

(The document referred to was marked as Plaintiff's Exhibit 21, and was received in evidence.)

Q. (By Mr. Savage): Mr. Anderson, you were with Mr. Howard Stafford and Mr. Kim, when you went down to this so-called parent tree, or mother tree, in 1954? A. I was.

Q. And when did you—as I understand it, you were over in the Hunter orchard? A. Yes.

(Testimony of Frederic W. Anderson.)

Q. And did Mr. Hunter—did you see Mr. Hunter over there? A. Yes.

Q. And where did he come from?

A. Well, he was apparently supervising a crew picking LeGrand nectarines, and when we approached he came out and [510] met the group.

Q. And then did you proceed to this mother tree, with Mr. Hunter?

A. Yes, after a few minutes, just a short conversation.

Q. Will you give that conversation in the presence of Mr. Hunter?

A. I don't remember exactly how it went, but I remember the gist of it, that we told him that we had found on our way over two Sun Grand trees, and he said, well—oh, he said something about there being a peach limb, and I said that I hadn't seen any peach limb. He said, "Well, I'll take you over and show it to you—take you over and show the limb to you."

Q. Did he take you over there? A. Yes.

Q. What was the other conversation?

A. Well, when he got there, he said—he looked at the tree and he said, well, "something has happened to the limb" and he walked around the tree, and he says "well, it has been sawed off at this point recently, but I didn't know about."

Q. Was anything further said in the conversation as to whether Mr. Hunter had known Mr. Riesner?

A. Yes. We asked him, or I asked him—most

(Testimony of Frederic W. Anderson.)

of the conversation was with me actually, and I said, "How did you [511] get this tree, it's a Sun Grand which I orginated, and I just know it from being familiar with it?" And he said, "Well, I don't know what it is, Mr. Riesner came over and said he had a wonderful nectarine and asked my permission to bud a couple of trees, and I said that I had a couple of early ripening peach trees that I didn't care about and that he could bud them in those.

Q. Did he say whether or not Mr. Riesner had budded them in?

A. He didn't say, I don't think. It is hard to remember that far back. I don't recall that he said he had done it, but he had given him permission to do it, and I assumed that he had done it.

Q. Now, did you observe whether or not—I direct my question to the mother tree, whether or not the mother tree had been top worked or grafted or budded?

A. Well, it appeared to me as if it had been grafted. We had examined it before we got to Mr. Hunter, and then he brought us back there, and I established superficially, but after he told me that it had been grafted I paid no further attention. I think the word he used was top worked, but it might have been grafted.

Q. Was there any visual signs on that tree of grafting or top working?

A. Well, it seemed to me obvious at that time that it [512] had been grafted.

(Testimony of Frederic W. Anderson.)

Q. Were there visible signs that you could see that would indicate that?

A. My memory is vague now, but—just what those visible signs were, but it just looked to me as a grafted tree.

Q. What, aside from this so-called Sun Grand—was there another fruit on that tree?

A. No, there was no fruit—beg your pardon. There was no other fruit than Sun Grand on it.

Q. Were there any other branches, or any other type of fruit you could identify?

A. Aside from this one Mr. Hunter told us was sawed off I saw none.

Q. Now, coming to the point of mutation or sports, in your long and varied experience in propagation, and so forth, have you ever known of any sport or mutation where the form of glands, either reniform or globose or no glands, were transferred?

A. No, I have not. When it comes to fundamental characters in plant life that are vital to the life of the tree, such as leaves, they rarely happen. I know in other forms of plant life where mutations have occurred on leaves; on peach tree, from reniform to any other kind I have never seen or read of one.

Q. In your opinion, is it possible that a sport from [513] this tree, assuming it to be a peach, if you want to, there would be a change of glands from reniform to globose?

A. Well, when you say “possible,” I suppose

(Testimony of Frederic W. Anderson.)

theoretically it is possible. I have never seen one or read of one, is all I can say.

Q. And what is the probability that a sport from a LeGrand tree—LeGrand tree has what kind of glands? A. Reniform glands.

Q. If there was a sport from the LeGrand tree, did you ever hear of such a sport changing the gland texture of the leaves? A. No, I have not.

Q. In any of your reading, have you ever heard of such a thing?

A. If so I don't recall it. I don't remember ever reading of such a change in peach or nectarine leaves.

Q. Now, the LeGrand nectarine is a clingstone, isn't it? A. That's correct.

Q. Have you ever known of any sport or mutation in which a clingstone was changed by such sport or mutation to a freestone?

A. I never have, and I wouldn't accept it because a clingstone is recessive to freestone and it is extremely rare in any kind of plant life that there is a mutation from a recessive to a dominant character. It is known, there have [514] been a few in other forms of plant life, but I have never known it in peach trees from clingstone to freestone, peaches or nectarine trees, from clingstone to freestone.

Q. As to the many similar characteristics which you have testified to—not similar, but identical characteristics you have testified to heretofore, between the Red King and the Sun Grand, in your

(Testimony of Frederic W. Anderson.)

opinion, is it likely that a mutation, as claimed by the defendant in his patent, from the LeGrand that those characteristics will be transferred by a mutation? We will talk about the kernels and the pits, for example, between bitter and sweet?

A. No, bud sports or bud mutations rarely occur in anything fundamental that affects the life of the plant; if it does, the plant obviously doesn't grow. On minor characters, oh, color of fruit, size of fruit, and minor things it can happen, and continue to live, but these—like color and minor differences in shape can—in the fruit can occur with much greater frequency, at least, than they do in the fundamental characters.

Q. You in your direct testimony talked about qualitative and the quantitative. Have you ever known of any transmission of those qualitative characteristics of a nectarine being transferred by mutation?

A. I would have to think what they are. Oh, yes, let's see. Yes, there have been qualitative characters that have [515] mutated, qualitative—these are qualitative characters as far as identification is concerned. They are not necessarily important characters to the peach tree. They are characters that are very important to the man that is trying to identify them, but they may not be important from the tree's viewpoint, I mean to continue the life of a tree.

Q. Have you ever known a combination of all those characters being transmitted by sport?

(Testimony of Frederic W. Anderson.)

A. Well, at the moment I don't think of any, but I would expect that—no, I don't know, I would expect probably that it would happen, the petals of a flower wouldn't make too much difference to the life of the tree, if petals should change color slightly or change size slightly. I don't know of any, but I think it might be possible.

Q. Mr. Anderson, I forgot to ask you, you have a compilation of these reports here.

A. Oh, yes. I made a summary of them, just to cover the whole thing. The summary only covers the three varieties, LeGrand, Sun Grand and Red King.

Q. You made that——

A. It's from those charts and covers each day.

Q. The '58 season? A. The '58 season.

Mr. Savage: You want to see this?

Mr. Griswold: Yes. [516]

Q. (By Mr. Savage): While they are looking at that, could you tell us what is the peak of the ripening of Sun Grand and Red King?

A. Yes, I made a summary, taking the range of the peak, and heavy packing period.

Q. And what is that?

A. Well, it won't take long to read it, the range for Sun Grand—now, this range is the first picking report, the first packing report, rather, to the last packing report, and that range for Sun Grand began July 5th and finished August 6th. The range for Red King began July 5th, finished July 24th. The range for LeGrand started July 11th from Kern County,

(Testimony of Frederic W. Anderson.)

and August 17th was the final figure, probably from fairly far north. No, they gave them by counties, I wouldn't be certain where they were from. The peak the harvest, that is the heaviest harvesting period for each variety, for Sun Grand was July 5th to 10th, for Red King July 5th to 9th, for LeGrand July 25 to 28th. The heaviest packing period in the case of Sun Grand, that was over 10,000 packages daily, was from July 5th to July 16th, for Red King July 5th to 13th, for LeGrand from July 21st to 31st. Then I made a further one from private reports, but not from this.

Q. That is all right. Give it to us.

A. From my own orchard, I have the figures here, Merced County, which is 50 miles to the north, Sun Grand July 7th to 18th; Tagus orchard, Tulare County, which is close to Mr. Hagler's orchard, Sun Grand July 7th to 14th; Kim Brothers orchard, Fresno County, Sun Grand, June 29th to July 22nd; the Hagler orchard, Tulare County with Red Kings, July 2nd to 18th.

Mr. Savage: We would like to have this in for argument; it is simple.

The Court: It may be received.

Mr. Savage: We would like to put in this one exhibit too.

The Court: It may be received.

The Clerk: 22 and 23.

(The documents referred to were marked as Plaintiff's Exhibits 22 and 23, and were received in evidence.)

(Testimony of Frederic W. Anderson.)

Mr. Savage: You may cross-examine.

Cross-Examination

By Mr. Houk:

Q. Mr. Anderson, this last exhibit just put in, that you have just been talking about, is that based upon the packing records?

A. Yes, the last three that I read from private records were my own, and the Tagus ranch were not from those. They don't give that, but all the preceding ones were from those reports.

Q. But they are the dates the fruit was packed?

A. Yes, that is correct. [518]

Q. Now, regarding the tree in question on the Hunter place, when you first went there how many trees did you see that you felt were possibly Sun Grand trees in your opinion?

A. In my opinion there were two trees, although there was only fruit on one.

Q. All right. Now, where were they located as far as you know?

A. Well, my idea of location is different from this so-called accused tree, but I am not sure of that. It's a long time, but as I remember, we went across there. I didn't remember being out on the edge of the orchard.

Q. Where did you remember it being?

A. Well, I don't know just how far in, but I don't think I was to the edge of the orchard at that time, but I don't know just where it was. It was not very far, maybe six or eight or ten trees, something

(Testimony of Frederic W. Anderson.)

like that, but it is vague in my mind now. All I know is we stopped by Mr. Hunter's house, asked for him there and didn't find him, and then went out toward where they were picking, and Mr. Hunter—and we found these two trees that were obviously different from LeGrand, and I said, "Well, these look like Sun Grand," and then we looked at the fruit, and finally found some down low—low down, and I told Mr. Kim and Mr. Stafford that they were——

Mr. Shepard: He asked where the trees [519] were.

The Witness: O.K.

Q. (By Mr. Houk): Then these two trees that you found, you found one or two trees?

A. One tree.

Q. And where was the fruit?

A. It was, oh, down low in the shade underneath.

Q. Was there very much fruit?

A. No, just—no, a very limited number. As of now I would say there were half a dozen fruits.

Q. They were late fruit?

A. They apparently had been left in picking as too small or too green and had grown considerably. You see, they were picking LeGrand, which normally ripens two to three weeks later.

Q. All right. Now, you were back this summer to this—withdraw that question. After you saw the tree there originally, did you go back—when did you first go back again?

(Testimony of Frederic W. Anderson.)

A. This past summer with Mr. Savage to get samples of the fruit, and Mr. Hagler and you showed me.

Q. You saw this particular tree at that time?

A. This particular accused tree, yes.

Q. Yes. Was it in the same location you saw the trees the first time? [520]

A. Well, as I told you, I didn't think so, but I could have been mistaken.

Q. I see.

A. But I don't think I was mistaken.

Q. All right, did you see the second tree this time? A. No.

Q. Mr. Anderson, isn't it true that these different fruit varieties of nectarines are hard at times to tell apart?

A. Yes, there are difficulties involved. I am quite sure that I can tell my own—the varieties that I have originated, and I am quite sure that I can tell all standard varieties apart, if I see all the characteristics. I have to see all the way through—I have to see the leaf type, I have to see the flower type, and I have to see the fruit, fruit of course being the most important single thing.

Mr. Houk: I think that is all, your Honor.

The Court: Any redirect?

Mr. Shepard: No questions.

The Court: All right, call your next witness.

Mr. Shepard: We have no further witnesses in rebuttal.

The Court: Any surrebuttal?

Mr. Griswold: Yes, your Honor. We will call Mr. Riesner, Senior. [521]

ROY MILTON RIESNER, SR.

called by defendant as a witness in surrebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Roy Milton Riesner, Sr.

Direct Examination

By Mr. Griswold:

Q. Your address, Mr. Riesner?

A. Visalia, 720 Greenacre Drive.

Q. Your occupation? A. Nurseryman.

Q. How many years?

A. Approximately 50 years.

Q. All in Tulare County?

A. Well, practically all, I would say with the exception of maybe two or three years.

Q. Do you know Mr. Hunter that testified here today? A. I do.

Q. Do you know where he lives? A. I do.

Q. When did you first meet Mr. Hunter?

A. Mr. Hunter, I think some time late in 1955, must have been in November or December.

Q. And do you remember the occasion that you met Mr. Hunter? [522]

A. My son had been negotiating with Mr. Hunter for some land to plant nursery on, and then

(Testimony of Roy Milton Riesner, Sr.)

he called me to talk to Mr. Hunter, and he agreed to give us some ground for planting nursery stock.

Q. And you have nursery land on his property?

A. We still have nursery land on his property.

Q. When did you first see the fruit that has been described as Red King? A. 1954.

Q. And where was that? A. Where was it?

Q. Where?

A. This was on the Hunter ranch.

Q. And will you describe the occasion that you saw that fruit?

A. Yes. I had a call from Mr. Hagler saying that he had discovered a new nectarine, or strange to him, that he had never seen before, and he wanted me to come and see it, and Mr. Vaughn Girozian was there at the time.

Q. You testified you received the call.

A. So they wanted me to come out and I wasn't able to go out and my son went out, and I went out either one or two days later.

Q. And where did you go?

A. Well, they took me to the tree in the orchard and [523] showed it to me.

Q. "They," who do you mean?

A. That was, I think Mr. Hagler was there at that time.

Q. And you say "that tree," you mean the tree——

A. The tree that had the different kind of fruit on it, nectarine fruit.

(Testimony of Roy Milton Riesner, Sr.)

Q. That was on Mr. Hunter's land?

A. Mr. Hunter's land.

Q. Were you ever cognizant, or did you know of that tree prior to that time?

A. No, sir, I hadn't been on Mr. Hunter's place, I mean only since 1955, late in the year.

Q. Have you grafted very many trees?

A. Well, not myself, but we have had trees grafted and I have seen trees grafted.

Q. Under your supervision?

A. Well, some under my supervision, and some not.

Q. When you saw this tree on the Hunter property in 1954, will you describe what you saw in relation to that tree?

A. Well, he took me back in the orchard there, in the LeGrand orchard, and he showed me the tree. I think this is Mr. Hagler, not Mr. Hunter. Mr. Hagler took me that there, you understand. And I looked at the fruit and it was different fruit, and he asked me what I thought of it, and I said——

Q. You can't testify to what he told you. [524]

A. O.K.

Q. You looked at this tree? A. Yes.

Q. Based on your knowledge and experience, did you come to any conclusion as to the source of that new fruit that you saw?

A. Well, I judged it to be a mutation of some kind.

The Court: You didn't graft that limb on, or

(Testimony of Roy Milton Riesner, Sr.)

bud, or anything like that, so as to produce that offshoot?

The Witness: Did I graft it on?

The Court: Yes.

The Witness: No, sir.

The Court: All right.

Q. (By Mr. Griswold): At that time when you went on the Hunter property you did not meet Mr. Hunter in 1954?

A. Not at that time. The first time I was at Mr. Hunter's place was in 1955.

Mr. Griswold: No further questions.

The Court: Let me ask, I don't think it is fair to the witness, to leave any question, not ask categorical questions. Did you ever ask Mr. Hunter or Mr. Hagler for permission to experiment with a tree by grafting a new kind of nectarine?

The Witness: No, these belonged to Mr. Hunter.

The Court: Mr. Hunter? [525]

The Witness: No, I never did. You know, I didn't know Mr. Hunter in 1954.

The Court: Did anybody connected with your organization——

The Witness: No.

The Court: ——or did you send any of your men out at any time to plant?

The Witness: No.

The Court: When you saw this tree you formed the conclusion it wasn't a grafted tree but what you would call a——

(Testimony of Roy Milton Riesner, Sr.)

The Witness: It looked to me like a mutation.

The Court: All right.

Cross-Examination

By Mr. Shepard:

Q. Mr. Riesner, have you had occasion since Mr. Hagler patented, or even before he patented this Red King—have you had occasion in your nursery sales to sell any of these Red Kings?

A. No, sir.

Q. Do you have any plans to sell them?

A. No, sir.

Q. Do you sell the Gold Kings? A. Yes.

Q. And that is a nectarine that Mr. Hagler patented? A. That is right.

Q. As far as you know, you are the only one that sells [526] that Gold King?

A. As far as I know.

Q. Do you have an exclusive license?

A. I do.

Mr. Shepard: I think that is all.

Mr. Griswold: No further questions.

The Court: All right.

Mr. Griswold: Mr. Riesner, Jr.

ROBERT MILTON RIESNER, JR.

a witness for defendant in surrebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Robert Milton Riesner, Jr.

(Testimony of Robert Milton Riesner, Jr.)

Direct Examination

By Mr. Griswold:

Q. You are associated with your father?

A. Yes, I am.

Q. How many Riesners are there in Visalia, besides you and your father?

A. Only the two families, that is——

Q. Just you and your father?

A. That is correct.

Q. And of course you are in the nursery business with him? A. I am. [527]

Q. When did you first meet Mr. Hunter?

A. I met Mr. Hunter in 1955, around October, sometime in October.

Q. Where? A. On his ranch.

Q. Had you heard of a discovery of a new variety of nectarine on his ranch prior to that time?

A. Yes, I had.

Q. Had you been to the tree? A. Yes.

Q. When? A. In 1954.

Q. Will you relate the circumstances, how you got to that tree? A. I went with Mr. Hagler.

Q. The purpose of the visit?

A. To—Mr. Hagler asked me to look at the fruit, to see what it looked like.

Q. Had you ever seen that tree before?

A. No, I hadn't.

The Court: All right. Tell what you saw.

The Witness: Well, I saw a tree which had two limbs, two main limbs, as I remember, one limb, the

(Testimony of Robert Milton Riesner, Jr.)

one we call the mutation, looked like a mutation to me, was forked and it had fruit on it. There was another limb which also had fruit [528] on it, which appeared to be LeGrand to me.

Q. (By Mr. Griswold): At that time had you ever touched that tree in any way, shape or form?

A. No.

Q. You didn't know the tree was there?

A. No.

The Court: Had you been there before? Had you grafted that tree?

The Witness: No, sir.

The Court: Had anyone else, your father, put a graft on that tree?

The Witness: No, sir.

Q. (By Mr. Griswold): Do you know of anybody that grafted that tree? A. I do not.

The Court: Well, he wouldn't know unless connected with his organization. Where did you acquire your knowledge, by practice?

The Witness: Just by practice, yes.

The Court: You didn't take an agricultural course?

The Witness: I did not.

The Court: All right.

Q. (By Mr. Griswold): This tree that you saw, describe it in relation to [529] the other trees in the orchard?

A. Well, it appeared to be the same size, or about the same size, I didn't notice any difference in size, it looked about ten or twelve feet tall.

(Testimony of Robert Milton Riesner, Jr.)

The Court: There is some dispute whether it was on the edge of the orchard or away from it.

The Witness: Well, it was on the outside row, the easternmost row.

The Court: Would you say it was the last row?

The Witness: The last row, yes, the outside row on the eastern side.

The Court: What is there around the trees?

The Witness: Well, on the east side there is a fence line and an alfalfa field and pasture on the other side.

The Court: I see. All right.

Cross-Examination

By Mr. Shepard:

Q. In 1954, Mr. Riesner, your nursery had nursery growing plots on the Hagler ranch?

A. That is correct.

Q. How big an acreage?

A. Oh, approximately ten acres, ten, fifteen acres. I have forgotten.

Q. The Hagler ranch is more or less directly adjacent. Across the street from the Hunter [530] ranch?

A. Yes.

Q. And that nursery plot, was that known to the community to be the Riesner nursery plot, and trucks coming back and forth there, and so forth?

A. I suppose there. There was no name there.

Mr. Shepard: That is all.

The Court: What kind of arrangement do you

(Testimony of Robert Milton Riesner, Jr.)
make? Do you lease part of the ranch and then you plant your own trees?

The Witness: Yes.

The Court: To grow your own nursery?

The Witness: Yes, we rent the land.

The Court: You rent the land. On what basis do you rent?

The Witness: Well, it depends, sometimes it is a cash rent, sometimes it is in exchange for trees.

The Court: Well, in that particular case what kind of an arrangement did you have?

The Witness: In this particular case it was exchange for trees.

The Court: Exchange for trees. And then you or your men do all the work?

The Witness: Yes.

The Court: How do you arrange for water, because the water system is the same? How do you arrange for sharing the expense of water for irrigation?

The Witness: That just all goes in; Mr. Hagler is very [531] lenient, he didn't particularly care.

The Court: I see. All right.

Mr. Shepard: No further questions.

The Court: All right, step down.

Mr. Griswold: Mr. Hunter.

JOSEPH HUNTER

called as a witness by defendant in surrebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griswold:

Q. Mr. Hunter, you have heard, related by Mr. Anderson, a conversation that he had with you in 1954, on your ranch?

A. I never had a conversation.

The Court: This witness was asked when he was here before. He was asked if he made that statement and he denied it, and that is why he went into the question with the others. He doesn't need to deny it again.

Mr. Griswold: I don't know whether I asked him this:

Q. Did you or anyone under your control or direction ever touch this discovery tree prior to the time it developed fruit?

A. No; I don't know of anybody that touched it.

Mr. Griswold: No further questions.

The Court: Did you ever give anyone permission——

The Witness: No, sir. [532]

The Court: ——whether Mr. Riesner or anyone else to do any experimental work by grafting something else on?

The Witness: No, I never gave permission.

The Court: Do you know anybody who did?

(Testimony of Joseph Hunter.)

The Witness: No.

The Court: Where is your house located with reference to the——

The Witness: To the orchard?

The Court: ——orchard, yes.

The Witness: It is on the west side of the orchard, next to the road.

The Court: Well, how far would it be from this accused tree, shall we call it?

A. That is across, I would say, about 60 acres, probably, well, I guess close to a quarter of a mile.

The Court: What is your recollection as to the location of this tree?

The Witness: Pardon?

The Court: What is your—not recollection, because the tree is still there. Where is this tree located?

The Witness: Well, it's on the first row on the east of the orchard, and the second tree from the north.

The Court: It has always been there?

The Witness: Ever since I had the orchard.

The Court: How about the second tree that seems to have [533] disappeared. Did you ever remove any tree?

The Witness: No; they are all there; I never took out any tree.

The Court: By the way, did you plant that orchard yourself?

The Witness: Well, I had it planted.

(Testimony of Joseph Hunter.)

The Court: I mean you had it planted. I didn't expect you did the laborer work.

The Witness: Yes.

The Court: That doesn't go with the type of farming done. How many years ago?

The Witness: Well, we had that ranch since about '41, but we didn't plant any trees until, I think, '49.

The Court: And you supervise the operation?

The Witness: Well, I and my brother.

The Court: Your brother?

The Witness: Yes.

The Court: Brother live on the place, too?

The Witness: Yes, when he is not away from the place.

The Court: What is he, one of these hunters?

The Witness: When he is mining.

The Court: I see. Is it possible that anyone could have gone to your place and started this experiment with a tree without your noticing?

The Witness: Well, I don't know any object in doing that.

The Court: I see. All right. [534]

Cross-Examination

By Mr. Shepard:

Q. Just a word, Mr. Hunter. I forgot, your Honor, whether I asked this question: Did you receive a letter from the Kim Brothers in 1954, shortly after their visit, advising you that you had

(Testimony of Joseph Hunter.)

a Sun Grand tree, or Sun Grand trees, on your ranch and that it would be an infringement?

A. I remember getting a letter from—in regard to Kim Brothers.

Q. And they referred to the tree they had seen on their visit out there? A. I guess so.

Q. You are away quite a bit mining, too, aren't you, sir? A. Pardon?

Q. You are away from the ranch in your mining work quite a bit, too?

A. Well, we have another ranch over in the Carruthers district, I was over there, but no more.

Q. In 1954 you were up in Nevada somewhere mining, you said?

A. No; not in 1954. I may have been up there in the late months, but during the fruit season I was either over at the Carruthers ranch or home.

Mr. Shepard: We have no further questions.

The Court: All right. Step down. Any further testimony, gentlemen? [535]

Mr. Griswold: Yes, your Honor, I have one more witness. Mr. Girozian.

The Court: Let's call him back.

VAUGHN GIROZIAN

a witness for defendant in surrebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Griswold:

Q. Mr. Girozian, you have testified as to the

(Testimony of Vaughn Girozian.)

size of your packing operations. Have you in the same season packed Sun Grand as well as Red King? A. Yes, in 1957.

Q. Is your specialty fresh fruit for the eastern markets?

A. Yes, sir; our main interest is tree fruit. We ship grapes, too, but tree fruit mostly.

Q. And that goes out by rail and truck to all of the eastern markets? A. Yes.

Q. You have seen both varieties of this fruit, have you not, the Red King and Sun Grand?

A. Yes, sir.

Q. Have you, at your packing house, ever had any difficulty in determining which is which?

A. No.

Q. Can you characterize it from a packer's standpoint, [536] how you determine what is Red King and what is Sun Grand?

A. Well, it is more rounded, and then it has got a waxy color, red color, it's got a little lighter color.

Q. You are speaking of the Red King?

A. Red King.

Q. What has been your experience as far as sales of the Red King variety?

A. Well, the Sun Grand is advertised, you know, and they call up and say, "Got any Sun Grands," and I tell them I have no Sun Grands but I got Red Kings, so——

The Court: Good salesman.

(Testimony of Vaughn Girozian.)

A. —they ask me, "How does it compare with the Sun Grand?" I got to be honest with them, I tell them ours is more red, rounded, and got a red color, so they take my word, they say, "Ship me some," and then they always repeat. Our business is, we got so many customers and it is all repeat. If you lie to them once or twice then you got to find new customers, so they take your word for it over the phone, and then they always repeat.

The Court: I gather then you think it is a superior fruit?

The Witness: I think it is, your Honor, it has got a waxier color. Of course, that is everybody's opinion.

The Court: I see. All right.

Mr. Griswold: No further questions.

Mr. Shepard: No questions. [537]

The Court: All right. Now you can go about your business.

Mr. Griswold: That is all, your Honor.

The Court: How about the plaintiff?

Mr. Savage: That is all.

Mr. Shepard: Nothing further.

The Court: All right, gentlemen, we made it with four minutes to spare.

Let the record show that both sides have rested. The only thing that remains is to give the clerk the exhibits, being photographs of the three bags of fruit, and also the photographs of the boxes when they arrive, and they have already been given numbers, and if they are here Monday you may

look at them. If not, we will have to be satisfied with what we remember of the boxes and of the fruit if it isn't too spoiled by that time.

Now, gentlemen, we will have to adjourn until Monday. I am going to give you the entire day, but I don't like to leave counsel and myself in the dark as to the amount of argument. We concluded this case in four days, four trial days, and if you want an entire day you may have it, but I would rather have an understanding of how much time each side wants, because there are just so many hours. Argument is difficult to follow, and much more difficult to take down solidly for the reporter. Miss Schulke is an excellent reporter, as you know, and that is why she has been retained here. I want to tell you she is the only one that has been [538] retained permanently for this division, regardless of who is appointed as a Judge, she will be the reporter of this Northern Division. But it is very hard on the reporter to put in more than four or four and a half hours of argument. It has occurred to me, in order to put in four hours of argument we would have to put in about five hours, because you have to break the continuity. If each side is allowed two hours that should be ample in a case of this kind which is not complicated or involved, and while there are a lot of exhibits, they are unlike any other case because they all relate to a question of identity or similarity or differences between two fruits.

I am anxious to finish this Monday, because if

we don't, we will have to go to Thursday, because I don't want to disorganize the case set for Wednesday by trailing this case.

Mr. Shepard: Sir, on behalf of plaintiff, I would say that we do not anticipate taking two hours.

The Court: There is one other matter, gentlemen. The plaintiff has the opening and closing. Some Judges want the same person to argue. I have no such rule. If you want to make the opening and Mr. Savage make the closing, it is all right with me, so long as you don't repeat, and so far as the defendant is concerned, if you want to divide your argument you may. Sometimes in a patent case there is a division of argument. In these complicated chemical and [539] mechanical patents that we have referred to, we had division because one man handled the scientists and the other man handled the law. If you want, for some reason, to divide your argument you may do so, provided there is no repetition. So you make your arrangement, any way you want.

If that is the understanding, gentlemen, we will adjourn until Monday morning at 10:00 o'clock, and then we will see by noon how we get along. We may cut the noon hour short, as we have done repeatedly. Before I do that, I want to apologize to everybody, including Mr. Eiland, for the long hours. This is not the only case in which we have done it, but it happens that there has been a large number of cases set, and I crowded the people in front of you in order to allow this new date, be-

cause I felt that Judge Jertberg, although he was willing, shouldn't undertake the trial of this lawsuit, because although in fact he was assigned to this district for a month after he took oath, we haven't called upon him to do anything but sign formal orders in matters and finish matters that were left unfinished.

Then we will take our adjournment at this time, and I will see you Monday at 10:00 o'clock.

(Thereupon at 4:30 o'clock p.m. a recess was taken until 10:00 a.m., Monday, November 10, 1958.)

[Endorsed]: Filed January 27, 1959. [540]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages, numbered 1 to 50, inclusive, containing the original:

Complaint.

Answer.

Pretrial Conference Order, filed 3/3/58.

Minute Orders for 11/4/58, 11/5/58, 11/6/58, 11/7/58 and 11/10/58.

Opinion of the Court, filed 11/21/58.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Application for Order Extending Time to File and Docket the Record on Appeal.

Order Extending Time to File and Docket the Record on Appeal.

B. Four volumes of Reporter's Official Transcript of Proceedings had on:

Nov. 4, 1958; Nov. 5, 1958; Nov. 6, 1958, and Nov. 7, 1958.

C. Plaintiff's Exhibits: 1 to 16, inclusive; 19 to 23, inclusive.

Defendant's Exhibits: A, B, F, F-1, G, G-1, H, H-1, I, J-1, J-2, J-3, K and L.

D. Depositions of Howard B. Stafford and Frederic W. Anderson.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: February 6, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16351. United States Court of Appeals for the Ninth Circuit. Kim Bros., a Partnership, Appellant, vs. L. A. Hagler, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Northern Division.

Filed and Docketed: February 6, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth
Circuit, San Francisco, California
No. 16351

KIM BROS., a Partnership,
Plaintiff and Appellant,

vs.

L. A. HAGLER, et al.,
Defendants and Appellee.

STATEMENT OF POINTS PURSUANT
TO RULE 17, SUBDIVISION 6

Comes now the Appellant above designated and states the following points on which he intends to rely in this Appeal, pursuant to Rule 17, Subdivision 6 of the Rules of the United States Court of Appeals, for the Ninth Circuit:

1. That the Honorable United States Court below, erred in overruling Appellee's objections to the admission of United States Plant Patent No. 1718, Defendant's Exhibit "A," offered in evidence by Defendants and Appellee.

2. That the Honorable U. S. Court below erred in admitting and in considering U. S. Plant Patent No. 1718, as a valid plant patent, in that said Patent No. 1718 was invalid and in that said Patent did not validly cover the accused fruit of the Defendant and Appellee, which accused fruit was alleged to infringe on Appellant's Patent No. 974; that the claims of said Plant Patent No. 1718 were erroneously interpreted, and erroneously applied to the accused fruit of the Appellee; that said Patent No. 1718 was erroneously used by the Hon-

orable U. S. District Court to invoke the presumption of validity and innocence in favor of the accused fruit.

3. That the errors and admission in the use of Plant Patent No. 1718 were prejudicial in that the evidence concerning the alleged infringement was sharply conflicting and could be reasonably and fairly interpreted in favor of a judgment of infringement.

4. That the following Findings of Fact are not supported by the Evidence:

- (a) Finding of Fact No. 3;
- (b) Finding of Fact No. 4;
- (c) Finding of Fact No. 9;
- (d) Finding of Fact No. 10;
- (e) Finding of Fact No. 11;
- (f) Finding of Fact No. 12;
- (g) Finding of Fact No. 13.

5. That the Paragraph No. 1 of the Conclusions of Law is an erroneous conclusion and unsupported by the evidence.

6. That in view of the above points, the Judgment is erroneous and should be reversed.

Dated: This 2nd day of March, 1959.

SAVAGE & SHEPARD,

By /s/ RICHARD L. SHEPARD,

Attorneys for Plaintiff and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 3, 1959.

